RECORD, CASE No. 14,529.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., ~~576~~ 406 102

STEVENSON BURKE AND CHARLES G. HICKOX, ADMINISTRATOR OF CHARLES HICKOX, DECEASED, APPELLANTS,

vs.

THE AMERICAN LOAN AND TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED MARCH 20, 1891.

RECORD, CASE No. 14,529.

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OCTOBER TERM, 1892.

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vs.

THE AMERICAN LOAN AND TRUST COMPANY.

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1 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-room, in the city of Toledo, in said district aforesaid, before Hon. Augustus J. Ricks, district judge for the district aforesaid, on the twentieth day of December, the same being a day of the December term of said court, in the year of our Lord one thousand eight hundred and ninety, and in the one hundred and fifteenth year of the Independence of the United States of America.

2 Afterwards, to wit, on the 14th day of April, A. D. 1886, there was filed in the clerk's office of said court the following bill, to wit:

Bill.

United States Circuit Court, Northern District of Ohio, Western Division.

To the honorable the judges of the circuit court of the United States for the northern district of Ohio and western division thereof, in chancery sitting:

Your orator, The American Loan and Trust Company, hereinafter described as the plaintiff, brings this its bill of complaint against the Toledo, Columbus & Southern Railway Company and Theophilus P. Brown, and thereupon the plaintiff complains and states as follows:

The plaintiff, The American Loan & Trust Company, says it is a body corporate, duly created and organized under the laws of the State of New York, and it is a citizen of said State; that the defendant The Toledo, Columbus & Southern Railway Company is a body corporate, created and organized under the laws of the State of Ohio, and is the owner of a completed line of railroad extending from the city of Toledo, in Lucas county, Ohio, through the county of Wood to the city of Findlay, in the county of Hancock, in said State of Ohio, and is engaged in running and operating the same, and that the defendant Theophilus P. Brown is a citizen and resident of said State of Ohio.

The plaintiff further says that the defendant The Toledo, Columbus & Southern Railway Company was duly incorporated
3 under the laws of Ohio, with an authorized capital stock of five millions of dollars, to build and operate a railroad from the said city of Toledo through the city of Columbus, in Franklin county, to the village of Belpre, within the State of Ohio, and on the Ohio river opposite the city of Parkersburg, in the State of West Virginia, prior to the twenty-ninth day of March, A. D. 1885, and prior to the twenty-second day of April, 1885, the said railway company had acquired by purchase a completed line of railroad extending from the said city of Toledo in the direction of the said city of

Columbus to the said city of Findlay, within one and one-fourth miles of the tracks of the L., B. & W. and Lake Erie & Western Railway Companies in the said city of Findlay, and in part payment for said completed railroad had issued its bonds to Francello G. Jillson for the sum of eight hundred thousand dollars secured by a mortgage upon said completed line of railroad and all its other property, present and future, and all its rights and franchises, and had also become the owner of certain cars, engines, and equipment with which it was engaged in operating its said completed line of railroad.

That on the 22nd day of April, 1885, in order to pay and satisfy the mortgage last aforesaid, and to provide the money to complete its line of railway to its southern terminus, opposite said city of Parkersburg as aforesaid, and provide its said line with the necessary terminal facilities and equip the same, the defendant The Toledo, Columbus & Southern Railway Company, by its deed of trust or mortgage of that date, duly executed, acknowledged, and delivered on the 26th day of March, 1885, did convey to the
4 plaintiff and its successors and assigns forever all and singular the estate and property, real, personal, and mixed, which was then owned and acquired or which might thereafter be owned or acquired by said The Toledo, Columbus and Southern Railway Company and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind, whether then held and owned or occupied by or belonging to the said railway company or at any time thereafter acquired for the use of said railroad or in connection therewith by said party of the first part, including all and singular the lines of railroad of the said railway company known and designated as the Toledo, Columbus and Southern Railway Company, beginning at a point in or near the city of Toledo, Lucas county, State of Ohio, and running thence through said Lucas county into and through the counties of Wood and Hancock to the city of Findlay, in said Hancock county, and thence through said city of Findlay and through said county of Hancock to and through the counties of Hardin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs, to the town of Belpre, a point upon the north bank of the Ohio river, a distance of two hundred and fifty miles, more or less, and also all and singular the lands, railroads, tracks, superstructure, rails laid or to be laid, siding, turn-outs, bridges, piers, wharves, viaducts, culverts, walls, fences, way- and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, built or to be built, depot grounds and lands procured, provided, or intended for use for that purpose, land used or
5 procured or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges, whether then belonging or appertaining to or used or procured or designed to be used for the purpose of or in connection with the said lines of railroad or the maintenance or operation thereof or of any part thereof,

or whether the same should at any time thereafter belong or appertain to or to be used or procured or obtained with the design of being used for the purposes of or in connection with said lines of railroad or the maintenance or operation of the same or any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars, and other cars, and all other rolling stock or equipment, and all machinery, tools and implements, rails, chairs, and spikes, and other material whatsoever now owned or possessed by said railway company or its successors for the uses or purposes or designed for use in connection with or for the operation, maintenance, or reparation of the said lines of railroad or any part thereof or the equipment or the appurtenances thereof, and also all and singular the rights, privileges, and franchises which the said railway company then held, possessed, or was entitled unto, and also all the rights, privileges, and franchises which the said railway company should thereafter acquire or become possessed of or entitled unto for or in respect of or for the uses or purposes of the said lines of railroad or the operation or maintenance of the same or any part thereof, and also all the tolls and incomes of the said lines of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid or of any of them or any part thereof, and the reversion and reversions, remainder
6 and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of the said railway company in and to the same and every part and parcel thereof, in trust, to secure the payment of five thousand bonds of one thousand dollars each, dated April 22nd, 1885, payable on the first day of July, 1925, in gold coin of the United States of the present weight and fineness, to the plaintiff or bearer, with six per cent. interest per annum, payable semi-annually on the first days of July and January of each year from date, at the office of the plaintiff, in the city of New York, with coupons attached for the payment of said semi-annual interest, payable to bearer in like gold coin, at the office of the plaintiff; which said bonds and coupons the said railway company, defendant, had theretofore resolved to execute and negotiate for the purposes aforesaid; which said deed of trust, after being duly executed and acknowledged by the plaintiff and the trusts thereof accepted by the plaintiff, was duly left for record in the recorder's office of the county of Lucas on the third day of June, 1885; in the recorder's office of the county of Wood on the ninth day of June, 1885, and in the recorder's office of the county of Hancock on the eighth day of June, 1885, and was duly and legally recorded in each of said counties prior to the tenth day of June, 1885, whereby the said mortgage became and is the first lien upon all the property, rights, and franchises, present and future, of The Toledo, Columbus and Southern Railway Company, defendant, heretofore described, mentioned, and referred to.

The plaintiff further says that it was further stipulated and
7 provided in said deed of trust or mortgage that the said bonds, coupons, and the trustee's certificate thereon should be sub-

stantially of the form set forth and recited in said mortgage or deed of trust, a copy of which is hereto annexed and herewith filed, marked Exhibit "A," and that none of said bonds should become valid until the certificate authenticating the same and endorsed on each of said bonds should be signed by said trustee, and that the plaintiff should hold said property hereinbefore described and referred to in trust for the equal *pro rata* use, benefit, and security of all persons and corporations who should become or be the owners or lawful holders of any of the said bonds to the aggregate amount of five millions of dollars intended to be secured by said deed of trust or of any of the coupons appertaining thereto, without preference of any of said bonds over any of the others by reason of the time of the issue or negotiation thereof.

And it was in and by said deed of trust further stipulated and provided that the said railway company, until default should be made by it in the payment of the principal or interest of said bonds or some one of them or some part thereof or in the performance of some other of the covenants, stipulations, and provisions on its part made in said deed of trust, might retain possession of said property and receive the tolls, incomes, and profits thereof, but that if default should be made in the payment of the principal or interest moneys mentioned in the said bonds or coupons or in any or either of them or any part thereof according to the tenor and effect of said bonds and coupons or either of them and if such default should continue for the
8 period of three months, then and in that case the plaintiff should be thereby authorized and empowered, upon the written request of the holders of one-fourth part of the said bonds then outstanding in respect of which or the coupons of which such default should have been made, to enter into and upon and take and hold possession of all the property hereinbefore and in said deed of trust described, mentioned, and referred to and in person or by one or more agents operate the said line of railroad and make from time to time all such repairs and replacements as it or they might deem judicious and all such useful additions, alterations, and improvements as the income coming into his or their hands should be adequate to pay for, and take, collect, and receive all tolls, earnings, profits, and income of said line of railroad and apply the same to the proper expenses of holding, operating, and managing the said line of railroad and conducting the business thereof, to the payment of all taxes and assessments thereon and all proper repairs, additions, and improvements on said property and all expenses, costs, and charges and counsel fees of the plaintiff and a reasonable compensation to it for its services, and next to the payment of the interest on said bonds in the order in which such interest shall have become or shall become due, and, after paying all said interest, to apply the same to the satisfaction of the principal of said bonds then due and unpaid ratably and without preference.

And it was further stipulated in and by said deed that the plaintiff should, out of the proceeds of any sale which under judicial

proceedings or otherwise might be made of the said property
9 and premises in enforcement of the security afforded by said deed, first pay the costs and expenses attending such sale and all counsel fees and expenses incurred by it in reference to the same, including a reasonable compensation to the plaintiff for its services, and apply the residue of the proceeds of such sale or so much thereof as might be necessary to the payment of the interest upon said bonds and the residue to the satisfaction of the principal thereof.

And it was further covenanted in and by said deed that the plaintiff should from time to time, on request of the said railway company, signed by its president and secretary, with its corporate seal affixed, certify and deliver said bonds to said officers, or on their order, as the same might be required.

And the plaintiff further says that in pursuance of the terms of said deed of trust it has certified and delivered unto said railway company one thousand of the bonds provided for in said deed, of one thousand dollars each, being bonds numbered consecutively from one to one thousand, and that of said bonds nine hundred and fourteen have been negotiated and are now outstanding, and that eighty-six bonds, the residue thereof, are in possession of said railway company and have not been negotiated.

That eight hundred of said bonds were negotiated and delivered in satisfaction of the bond and mortgage for the sum of $800,000 hereinbefore recited, and that the said bond and mortgage has been taken up and satisfied and the same cancelled of record.

10 The plaintiff further says that in pursuance of the certificate of incorporation and the certificate for the extension of the line of said railway company and of the purposes for which the said deed was executed and delivered to this plaintiff the said railway company has caused its line of railroad to be surveyed and located from said city of Findlay to a junction with the track of the Penn. R. R. Co., about eighteen miles from the city of Columbus, and has contracted with various owners of lands through which said extended line has been located for the right of way for about fifty miles of said extended line, the distance from said city of Findlay to said junction being about seventy miles; that said contracts have been procured at great expense and are very valuable and remain for the most part to be paid for, and that by the terms of said contracts said rights of way must soon be paid for—some of them during the present month—otherwise the same will become forfeited and the ability of said railway company to extend its line be greatly impaired and great and irreparable damage be done to the security of the holders of the bonds under the plaintiff's deed of trust; and this plaintiff is informed and believes that if said railroad be built to said junction a permanent and advantageous arrangement can be made by it for the use of the tracks of said Pennsylvania Company into the said city of Columbus, and that parties stand ready to purchase sufficient of the securities of the defendant railway company to enable it to extend its line of railroad to said city of Columbus, and would do so but for the acts of

the said Theophilus P. Brown and his confederates hereinafter set forth.

11 The plaintiff further says that the said Theophilus P. Brown has, since the organization of the defendant railway company, been a member of the board of directors thereof and holds one share of the capital stock thereof, which was transferred to him to qualify him as such director, and has ever since the organization of the defendant railway company been in charge of its said completed line of railroad and general manager thereof, and as such has had exclusive management of the operation of said railroad, and upon information and belief the plaintiff says that said Brown procured himself to be elected director and general manager of said railway company, and also procured contracts for a future interest therein by falsely representing that he had invested $150,000 of his own money in the construction of said railroad from Toledo to Findlay so purchased by the defendant railway company as aforesaid, and by representing that he was in favor of and would labor to promote the extension of said railroad as contemplated and provided for as aforesaid, and to aid in the accomplishment of which the said deed of trust was executed and delivered to the plaintiff.

The plaintiff further says that it is informed and believes that the said Theophilus P. Brown entered into a secret combination with the Columbus, Hocking Valley & Toledo Railway Company and the Toledo & Ohio Central Railway Company, the lines of whose roads are both parallel and competing lines with the line of the defendant railway company and extend from the city of Toledo to the city of Columbus, or with persons largely interested in the stock of

12 said railroad companies, acting in the interest of said companies and on their behalf, to defeat the extension of the line of the defendant railway company on or about the first day of November last, and in furtherance of the said secret combination entered into some contract with said competing railway companies or person or persons interested in the same and acting in their interests and on their behalf, and in pursuance of said secret combination and of said contract on the 25th day of March, 1886, the day of the annual election of directors for the defendant railway company, but of which no notice had been given, as required by the by-laws of said company, the said Theophilus P. Brown secretly and fraudulently, without notice to the defendant railway company or any of its officers other than two of the other directors of the defendant railway company, neither of whom had any interest in the property of said railway company other than as the holder of one share of its stock, which had nominally been transferred to each of them merely to qualify them as directors, and one of whom was the attorney of said Columbus, Toledo & Hocking Valley Railway Company and Toledo & Ohio Central Railroad Company, and without notice to any of the other stockholders of said defendant railway company the two attorneys of the competing lines of railway, acting as his attorneys, procured a judge of the court of common pleas of Lucas county, on the same day and immediately before the hour for holding said election, to make an order on a petition, which the said Brown caused to be prepared

by said two attorneys for that purpose, enjoining and prohibiting the voting at said election of any of the shares of the capital
13 stock of said railway company other than seven shares thereof by any person other than said Brown or his proxies, which said injunction was served, said petition being first filed in the clerk's office of said court at two o'clock in the afternoon of the day of said election, the regulations of the defendant railway company providing that the polls of said election should be opened at two o'clock in the afternoon and closed at three o'clock of the same afternoon. And after serving said injunction and thereby precluding all other stockholders from voting at said election, and after the president of said defendant railway company had declined to hold said election on account of said fraudulent injunction and left the office of said company because thereof, said Brown and his two confederates aforesaid went through the form of holding an election for directors of said defendant railway company, electing one of their number as chairman and the said chairman appointing the other two as tellers, and thereupon two of said directors cast ballots purporting to represent one share each of the capital stock of the defendant railway company, and the said Brown cast ballots purporting to represent 8,216 shares of said capital stock in favor of themselves as directors, and one Alexander W. Scott, the law partner of one of said three directors, and also another of the attorneys of said Columbus, Toledo & Hocking Valley Railway Company and of said Toledo & Ohio Central Railway Company, and made certificates of the election of said four confederates, together with three other former members of said board, so as to thereby constitute a board of directors, a majority of whom could carry out the
14 secret combination of said Brown as aforesaid, and said Brown, being in possession of the property of said railroad as general manager thereof, with his said confederate directors wrongfully and unlawfully has assumed control thereof for the purpose of defeating the extension of the line of the defendant's railway company as contemplated and provided for in the said deed of trust to this plaintiff and in the resolution of the board of directors and stockholders of said company, in pursuance of which the same was made and delivered to the plaintiff, a copy of which resolutions are hereunto annexed and filed herewith, marked Exhibit "B."

The plaintiff further says that the regulations of said defendant railway company provide that the stock of the company shall be voted by the persons in whose names the same shall stand on the transfer books of the company at the time of the election, and at the time of the said pretended election only 226 shares of stock stood on said transfer book in the name of said Brown, the said stock standing on the transfer book of said company as follows:

American Finance Company (trustee)	7,993 shares.
Israel B. Mason	1 "
Fancello G. Jillson	1 "
C. A. White	1 "
T. P. Brown	266 "

Samuel R. Follett	1	share.
J. H. Doyle	1	"
William F. Walker	1	"
W. C. Lemert	485	"

James M. Brown, Henry E. Lee, Frank A. Lee, C. F. Watts,
15 George P. Kirby, M. C. Fogerty, W. G. Alexander, Judd Richardson, James S. Robinson, J. G. Chamberlain, E. M. Brown, L. S. Teal, Chas. Hutchinson, Samuel Kohn, and Harvey Scribner each one share.

The plaintiff further says that the said Israel B. Mason and Francello G. Jillson furnished all the money actually invested in the property of said railway company, and they were induced to furnish the same under the representations of said Brown that he would cause the same to be extended through Columbus to the coal-fields of Ohio, and that the same could be so extended and equipped with stock and bonds not exceeding $20,000 per mile to the said coal-fields, and that the competing lines would be said Toledo & Ohio Central and Columbus, Hocking Valley & Toledo railroads, which had stock and bonds to many times more that $20,000 per mile each, and that said railway would thereby be very profitable; and said stock was so transferred to said American Finance Co., trustee, for the benefit and protection of said Mason and Jillson, who also hold a large majority of said outstanding mortgage bonds, so as to secure the extension of said railroad as aforesaid, and but for the fraudulent conduct of said Brown and said fraudulent injunction a board of directors of said railway company favorable to the extension of said railway would have been elected, all the parties interested in the stock and bonds of said defendant railway company, except said Brown and his confederates, being in favor of said extension and being actually engaged in the promotion thereof.

The plaintiff further says that the board of directors of said
16 defendant railway company as constituted prior to said election claim said election is null and void, but said Brown and his confederates have obtained possession of said railway, and unless restrained will carry out said conspiracy and defeat said extension and allow said contracts for said right of way to become forfeited, and the business and property of said railway company are liable to suffer by reason of said conflict of authority.

The plaintiff further says upon information and belief that said Brown entered into said secret combination with said competing railroad companies or persons acting in their interest and on their behalf as aforesaid about the first day of November last, and that since the formation of said secret combination the said Brown has been engaged and is now engaged in diverting the legitimate business of the defendant railroad company to the lines of the other competing roads in this petition mentioned, so as to prevent it from paying its operating expenses and the interest on its mortgage bonds issued under the plaintiff's deed of trust aforesaid.

That he has allowed and is suffering said road-bed, which is laid with steel rails, which constitutes the bulk of the value of said rail-

road, to become greatly out of repair, whereby the said rails are becoming bent and will soon become so bent and impaired as to become useless and of no value to said railway and the security of said bondholders greatly impaired.

That said Brown has sold and is now engaged in selling large quantities of ties from along the line of said railroad, so as to
17 deprive said company of ability to keep its line in repair and to extend the same, and will continue to do so unless a receiver be appointed, as herein prayed.

Plaintiff further says that the Ohio Central Terminal Railway Company owns valuable terminal facilities at Toledo, O., which are essential to the business of the defendant railway company and which it has now under lease, but which the said Toledo & Ohio Central Railway Co. desires to control so as to prevent the defendant railway company from doing a successful business at Toledo, and that said Brown will allow said rental to become and remain in default for the purpose of assisting said Toledo & Ohio Central Railway Company in obtaining possession of the same for the use of said Toledo & Ohio Central Railway Company and will, if he and his confederates are allowed to remain in posssession of the railroad of the defendant railway company, forfeit said lease and facilitate the said Toledo & Ohio Central Railway Co. in obtaining possession of the same, and thus destroy the capacity of the defendant railway Co. to earn money to pay its running expenses and the interest on its bonds and defeat the extension of said road as contemplated in plaintiff's deed of trust, and will also issue the bonds already certified by the plaintiff.

Plaintiff further says that unless said property is placed in the hands of a receiver of this court, with power to manage and operate the same, the said line of railroad, by reason of the secret combination of said Brown as aforesaid and his acts in executing and carrying out the same, will become greatly deteriorated in value; that its earnings will not pay its operating expenses, the se-
18 curity of the plaintiff's beneficiaries will be greatly impaired if not destroyed, the possession and control of said terminal facilities will be permanently lost, the rights of way for said extension will become forfeited, the steel rails on said railroad will become so bent as to be unfit for use, the business of said railroad permanently diverted from its line and the extension of said line of railroad from Findlay to Columbus, and thence through the coalfields to the Ohio river, be wholly prevented, and the trust of the plaintiff in its said deed will wholly fail and come to naught.

The plaintiff further says that no interest has ever been paid by the defendant railway company on any of the said one thousand bonds so certified and issued as aforesaid or upon any one of them, and the said bonds were so negotiated with all the coupons thereon maturing after the first day of July, 1885, and all the coupons upon each of said bonds negotiated and outstanding as aforesaid, which became due on the first day of January, 1886, are unpaid; that the defendant railway company is wholly insolvent and has not provided the means to pay the same or any part thereof, and that there is due thereon

the sum of $27,420.00, with interest from the first day of January, 1886, and that the default of said defendant railway company in the payment of said interest has continued more than thirty days and the holders of more than one-half of said bonds and coupons, upon which said sum of $27,420.00 aforesaid has been due since the first day of January, 1886, and unpaid, have requested the plaintiff in writing to enter and take possession of said railroad and property under said deed of trust and proceed to enforce the
19 said mortgage and protect said property against the loss, waste, and damage hereinbefore recited, and to that end to institute such proceedings as may be necessary to defend and protect their rights in the premises and prevent their said security under said deed of trust from being further impaired; and this plaintiff, in pursuance of written request, has demanded possession of said property from the president of said defendant railway company, who has failed and refused to deliver possession thereof in pursuance of the terms of said deed of trust, and this plaintiff cannot obtain possession of the same without the aid of this court, and would not be able, by reason of the controversies existing between the officers of said railway company, to manage the same except under the authority of a court of competent jurisdiction.

The plaintiff further says that the said mortgage security is insufficient to pay the bonded indebtedness of said railway company now outstanding, and it will be dissipated and wasted unless this court shall, by a receiver to be appointed by it, take and hold possession of said mortgaged property and effects during the pendency of this suit.

The plaintiff further says that for the reason of the embarrassed condition of said railway company's financial affairs and on account of the many legal difficulties which are manifest from the allegation hereinbefore in this petition contained, involved in the execution of the plaintiff's said several trusts, it is impossible for it, as such trustee, to execute any of said trusts in the way specified in said mortgage or deed of trust without the aid of this court in the exer-
20 cise of its chancery jurisdiction, nor can said trusts be executed, as the plaintiff is advised and charges, and the rights of all parties in interest be fully protected in the premises otherwise than by appointing a receiver in this suit to take possession of said mortgaged property and effects during the pendency of this suit and until the said mortgaged property can be sold under the orders of this court.

Wherefore the plaintiff prays this court to appoint a receiver of the said The Toledo, Columbus and Southern Railway Company, with full power and right to enter into and upon and take and hold possession of all and singular the premises, estates, franchises, rights, assets, unissued bonds, effects, privileges, and property granted and conveyed by said company to the plaintiff in and by said deed of trust or mortgage and hereinabove mentioned and described, and also with full power and right to operate the said line of railroad described in said deed of trust or mortgage; to make from time to time, under the orders of this court or the judge thereof, all such re-

pairs and replacements as the court shall deem to be necessary or judicious, and all such useful alterations, additions, and improvements as the income coming into the hands of said receiver shall be adequate to pay for or as the court may otherwise provide for the payment of, and to take and collect and receive all fares, freights, tolls, earnings, issues, profits, and income to the proper expenses of holding, operating, and managing the said line of railroad and premises and conducting
21 the business thereof to the payment of all taxes and assessments which shall be levied or assessed thereon or upon said premises, and all necessary and proper repairs, replacements, alterations, additions, and improvements upon said property, and all expenses, costs, charges, and counsel fees in the premises, and next to the payment of interest upon said bonds in the order in which such interest shall have become or shall become due to the persons holding the coupons evidencing the right to such interest (and after paying all interest which shall have become or shall become due to apply the same to the satisfaction of the principal of the said bonds then due and unpaid, but ratably and without discrimination or preference), and that the court may confer upon and invest said receiver with such other powers and authority and rights as the court may deem necessary or proper to enable the plaintiff to fully perform and execute the trusts created by said deed of trust or mortgage and to preserve unimpaired the said mortgaged property, effects, rights, and franchises and to fully protect the interests, rights, benefits, and advantages of the beneficiaries of said trusts according to the true intent and meaning of the provisions and covenants of said deed of trust or mortgage.

The plaintiff further prays that a preliminary injunction may be granted herein, to continue in force until the final hearing of this cause, restraining and enjoining the said The Toledo, Columbus and Southern Railway Company from issuing or disposing of or negotiating in any way or for any purpose the bonds or any of
22 the bonds of said railway company which have heretofore been certified by the plaintiff, but which have not been issued by said railway company and which are still in its possession, and that said railway company may be further enjoined and restrained from making any demand of the plaintiff to certify any other bonds than those heretofore certified by it under said mortgage or deed of trust.

The plaintiff further prays that the writ of subpœna may be issued against the said Toledo, Columbus and Southern Railway Company and the said Theophilus P. Brown, and that they may each be compelled to answer all and singular the premises.

The plaintiff further prays for such other, further, or different relief as the nature of the case may require and as the court shall deem equitable and proper.

By S. A. BOWMAN,
R. A. HARRISON,
Solicitors for Complainant.

STATE OF NEW YORK, } ss:
City and County of New York, }

Rowland N. Hazard, of city of New York, being duly sworn, on oath says that The American Loan and Trust Company, the plaintiff in the foregoing petition, is a corporation of said State of New York; that he is an officer thereof, being its president; that he has read the foregoing petition, and that the facts stated and allegations contained therein, which are set forth as upon information, he believes to be true, and that the other facts and allegations therein are true in substance and fact.

R. N. HAZARD.

Sworn to before me and signed in my presence this 7th day of April, A. D. 1886.

H. E. DOREMUS,
[SEAL.] *Notary Public, Kings County, N. Y.*

Certificate filed in New York county.

24 EXHIBIT "A."

An indenture of mortgage made the 22nd day of April 1885 by and between the Toledo, Columbus & Southern Railway Company, a corporation duly created and organized by and under the laws of the State of Ohio, the party of the first part, and the American Loan and Trust Company of the city, county and State of New York, party of the second part, witnesseth:

Whereas, the said party of the first part is authorized to construct, own, lease, purchase, maintain, and operate a railroad, together with all necessary appurtenances from a point in or near the city of Toledo, Lucas county, State of Ohio, to the Ohio river, and has full power, right and authority to incur indebtedness and borrow money upon the credit of the said railway company and to issue bonds and obligations therefor, and to secure the payment thereof by way of mortgage of all the property of the said company, and

Whereas the said party of the first part has heretofore acquired by purchase the certain completed line of railway extending from the city of Toledo aforesaid to the city of Findlay in the said State of Ohio, a distance of forty miles more or less, running through the counties of Lucas, Wood and Hancock, together with all and singular the lands, rights of way, railroads, tracks, superstructures, rails laid, sidings, turn-outs, bridges, piers, viaducts, culverts, walls, fences, ways and rights of way, depots and grounds, stations, station-houses, wood sheds, engine-houses, car-houses, freight houses, warehouses, building and repair shops, machine shops and also all other personal property, right thereto or interest therein, whether choses in action or in possession and all franchises rights and privileges of said pre-existing railway company, (including its franchises) and all personal and real property, of whatever

25

name or nature, ever held, owned or acquired by said company, and

Whereas the said party of the first part has likewise acquired by purchase certain cars, engines and equipment of great value from the trustees of a certain car trust and now holds and retains all such free of any and all lien and incumbrance, and

Whereas it is necessary to provide moneys for the purpose of completing the line of railway of said party of the first part and for the providing of suitable and necessary terminal facilities and in order to fully equip and operate said railroad to greater advantage, and

Whereas in the exercise of the powers in that behalf possessed by said party of the first part in order to provide for paying and discharging the proper liabilities of the said party of the first part, and in order to obtain money for completing its line of railway and to better equip and furnish the same and for the other lawful objects of said railway company the party of the first part, in accordance with the resolutions duly adopted by its stockholders and with the resolutions duly adopted by its board of directors at the meeting of said stockholders and board of directors, duly and regularly called and held, has determined to issue its bonds to the aggregate amount of five millions of dollars, payable in the gold coin of the United States of America, consisting of five thousand bonds for one thousand dollars each, numbered consecutively from one to five thousand, both inclusive and bearing date the 22nd day of April, A. D. 1885, by each of which bonds, the said party of the first part promises to
26 pay to the American Loan and Trust Company of New York or to the bearer of such bonds, one thousand dollars on the first day of July, A. D. nineteen hundred and twenty-five in the current American gold coin of or equivalent to the present standard weight and fineness now adopted by the sovereign authority of the United States of America, and to pay the interest on such principal sum of such bond, but according to the tenor of several coupons, thereunto attached and both principal and interest to be payable at the office of the said American Loan and Trust Company in the city of New York or at such other financial agency or agencies as the board of directors of said Toledo, Columbus & Southern Railway Company shall previously designate, and

Whereas, such bonds and the coupons or interest warrants to be annexed thereto, and the trustee's certificate to be endorsed thereon by the trustee of this mortgage, are to be in form, or substantially the form, following, that is to say :

UNITED STATES OF AMERICA, *State of Ohio.*

Six Per Cent. Forty-Year Gold Bond.

No. —. Issue limited to $20,000 per mile. $1,000.

Know all men by these presents that the Toledo, Columbus and Southern Railway Company, a corporation of the State of Ohio, for value received, is indebted to the American Loan and Trust Company of New York, State of New York, trustee or bearer, in the sum

of one thousand dollars, which sum the said Toledo, Columbus and Southern Railway Company hereby promises to pay to the bearer hereof on the first day of July, in the year one thousand nine hundred and twenty-five, in the gold coin of the United States, of
27 the present weight and fineness at the office of the financial agents of the said railway company in the city of New York, together with interest thereon from the first day of July one thousand eight hundred and eighty-five at the rate of six per cent. per annum, payable semi-annually at the office of said financial agents on the first day of January and the first day of July in each year in like gold coin, such interest to be payable until the payment of such principal sum, but according to the tenor of the annexed coupons and upon the presentation and surrender of the same as they severally fall due. If any default shall be made in the payment of the interest on this bond and such default shall continue for a period of six months, the principal sum hereof may thereupon be declared due and payable in accordance with the terms of the mortgage or deed of trust hereinafter mentioned. And the said obligor hereby waives *the* renounces any and all benefit of any and every extension, stay and appraisement law now in force, or which may at any time hereinafter be enacted by the State of Ohio or by any sovereign authority soever.

This bond is one of a series of five thousand bonds of one thousand dollars each, numbered consecutively from No. 1 to No. 5,000, both inclusive, all of like date and tenor, and without any preference by reason of priority of issue, or of any cause or thing soever, and all equally protected and payment thereof equally secured by a first mortgage or deed of trust of even date herewith, duly executed and delivered by said railway company to said American Loan and Trust Company, trustee, conveying to said trustee and its successors in the trust the railway and all rights of way therefor of said railway company in the State of Ohio, extending from the
28 city of Toledo, in Lucas county, through the counties of Lucas, Wood, Hancock, Hardin, Franklin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington and Meigs in said State, to a point on the Ohio river, opposite the city of Parkersburg, in West Virginia, a distance of two hundred and fifty miles, more or less, together with all equipment, appurtenances, revenues, franchises, privileges, immunities, tolls, incomes, licenses, rights of way, leases, grants, canals, wharves, docks, boats, shops, equipments, choses in action and all other property, real, personal and mixed of the said railway company, now owned or hereafter to be acquired by it, and mentioned and described in said mortgage or deed of trust, which mortgage is a first lien on all the property of said railway company.

It is likewise agreed between said railway company, acting for and in behalf of the present and future stockholders thereof, and the holders of this bond, that no recourse shall be had for payment hereof upon any present or future stockholder of said company, under and in pursuance of any law imposing liability upon stockholders of incorporated companies, whether such law shall be now

in force or shall be hereafter enacted. This bond shall not become valid or obligatory until the certificate authenticating the same, which is endorsed hereon, shall be signed by the trustee or its successors in the trust.

In witness whereof, the said Toledo, Columbus and Southern Railway Company has caused these presents to be sealed with its corporate seal, and to be signed by its president and attested by its secretary and the interest warrants or coupons annexed to be
29 attested by the engraved signature of its treasurer on the 22d day of April A. D. 1885.

TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO.,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

Form of Coupon.

The Toledo, Columbus and Southern Railway Company promises to pay to the bearer, at the office of the American Loan and Trust Company or other agency in the city of New York, thirty dollars in the gold coin of the United States of America on the first day of —— 188–, being six months' interest on its first-mortgage bond No. —.

$30.00. —— ——, *Treasurer.*

Form of Endorsement.

This bond may be registered in the owner's name, on the company's books in New York city, such registry being noted on the bond of the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which it shall be transferred by delivery, but it may be again registered as before. The registry of the bonds shall not restrain the negotiability of the coupons by delivery merely.

Form of Trustee's Certificate.

It is hereby certified that the within bond is one of the series described in the within-mentioned mortgage and that it is issued in accordance with the provisions of said mortgage, which mortgage is officially endorsed as having been recorded.

30 And whereas, such bonds are not to be entitled to share in the benefit or security of this mortgage unless they shall have endorsed thereon such certificate of the party of the second part; and

Whereas, the said coupons are to be issued with the engraved signature of the treasurer of said party of the first part, it is agreed by it that when thus issued such engraved signature shall be as binding as if the proper handwriting of the treasurer had been affixed to such coupons instead of such engraved signature; and

Whereas, by and in accordance with the resolutions of the stockholders and board of directors of the party of the first part, duly adopted at regular stated meetings called for such purpose, it has been determined to secure the payment of the principal and the interest of such bonds by this mortgage in the manner and to the effect hereafter expressed.

Now therefore, this indenture witnesseth, that in order to secure the due and punctual payment of the principal and interest mentioned in and to become payable upon the above-mentioned bonds to the amount in the aggregate of five million dollars in the gold coin of the United States of America, of the present standard weight and fineness and the coupon accompanying the same, according to the tenor and effect of such bonds and coupons respectively, and in consideration of the premises and of one dollar to the said party of the first part in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the said party of the first part hereto hath granted, bargained, sold, conveyed, assigned, aliened, enfeoffed, released, transferred, confirmed and set
31 over, and by these presents, doth grant, bargain, sell, assign, release, transfer, set over, alien, enfeoff, and convey unto said party of the second part, and to its successors and assigns forever, all and singular the estate and property, real, personal, and mixed, which is now owned, and acquired or which may hereafter be owned or acquired by said party of the first part, and all fixtures, rights, privileges, franchises, rights under leases, easements, terms and part of terms, agreements, covenants and contracts of all and every kind, whether now held and owned or occupied by or belonging to the said party of the first part, or at any time hereinafter acquired for the use of said railroad, or in connection therewith, by said party of the first part, including all and singular the lines of railroad of the said party of the first part, known and designated as the Toledo, Columbus and Southern Railway Company beginning at a point in or near the city of Toledo, Lucas county, State of Ohio, and running thence through said Lucas county into and through the counties of Wood and Hancock to the city of Findlay in said Hancock county, and thence through said city of Findlay and through said county of Hancock to and through the counties of Hardin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs, to the town of Belpre, a point upon the north bank of the Ohio river, a distance of two hundred and fifty miles, more or less, and also all and singular the lands, railroads, tracks, superstructure, rails laid, or to be *paid*, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, way and rights
32 of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, building and repair shops, machine shops, built or to be built, depot grounds and lands procured, provided or intended for use for that purpose, lands used or procured or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements and privileges, whether now belonging or appertaining

to or used or procured or designed to be used for the purpose of or in connection with the said lines of railroad, or the maintenance or operation thereof, or of any part thereof, or whether the same shall at any time hereafter belong or appertain to or to be used or procured or obtained with the design of being used for the purposes of, or in connection with, said lines of railroad or the maintenance or operation of the same or any part thereof, and also all the locomotives, tenders, passenger cars, baggage cars, freight cars and other cars and all other rolling stock or equipment and all machinery, tools and implements, rails, chairs, and spikes and other materials whatsoever, now owned or possessed by said party of the first part or its successors, for the uses or purposes, or designed for use in connection with, or for the operation, maintenance or reparation of the said lines of railroad, or of any part thereof, or the equipment or the appurtenances thereof, and also all and singular the rights, privileges, and franchises which the said party of the first part now holds, possesses or is entitled unto and also the rights, privileges and franchises which the said party of the first part shall hereafter acquire, or become possessed of, or entitled unto, for or in re-
33 spect of, or for the *the* uses or purposes of the said line of railroad, or the operation or maintenance of the same or any part thereof, and also all the tolls and incomes of the said lines of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid, or any of them, or any part thereof, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the said party of the first part of, in and to the same and every part and parcel thereof.

To have and to hold all and singular the said property and lines of railroad, with the appurtenances, rolling stock and equipments present and future and all other premises, properties, rights, interests, franchises, tolls, income, immunities, privileges and other things aforesaid, to the said party of the second part, as trustees as aforesaid and its successors and assigns forever: in trust, nevertheless, for the equal prorate use, benefit and security of all persons and corporations who shall become or be the owners or lawful holders of any of the said bonds to the aggregate amount of five millions of dollars intended to be hereby secured as aforesaid, which shall be hereafter issued, or of any of the coupons appertaining thereto, without preference of any of the said bonds over any of the others by reason of priority in the time of the issue or negotiation thereof, or otherwise howsoever.

And it is covenanted and agreed by and between the parties hereto that until default shall be made by the said party of the first part, its successors or assigns, in the payment of the principal or
34 interest of the said bonds, or some one of them, or some part thereof, or in the performance of some other of the covenants, stipulations and provisions on the part of the party of the first part in this indenture contained, the said party of the first part its successors or assigns shall be suffered and permitted to possess

and enjoy the said premises with the appurtenances and all and singular the rights and franchises hereinbefore described and to receive, take and use the tolls, income, earnings and profits thereof. And while the said party of the first part shall so remain in possession and there shall be no subsisting default in the payment of said interest or principal, or in the performance of the stipulations, conditions and provisions on the part of the said party of the first part, in this indenture contained, the said party of the second part, or its successors in the said trust, shall have full power and authority to be exercised in its or their own discretion and not otherwise and on the request of the party of the first part to release from the lien and operation of these presents, in such manner as it or they may deem proper, any portion of the premises hereby mortgaged which may be appurtenant to the said mortgaged line of railroad or any part thereof, or which may have been acquired or held for the uses or purposes thereof but which in judgment of the said trustee shall be no longer requisite for use in connection therewith, or which shall have been acquired or held for stations, depots, shops or other buildings, or for supplying fuel, gravel or other material, and which in the trustee's judgment shall no longer requisite to be kept for such purposes, and likewise any lands not occupied by the track which may become disused by reason of a change in the location of any station-house, depot, shop or
35 other building connected with the said railroad and likewise any land occupied by the tracks and adjacent to such station-house, depot, shop or other building which the said party of the first part, its successors or assigns, may deem it expedient to disuse or abandon by reason of such change, and likewise any part of the original line of track or roadway and of the depot grounds, buildings or accommodations connected therewith which may have been thrown out of or ceased to form part of the railroad at the time of such release by reason of straightening or alteration of the line of the road or otherwise. Provided, always, that the power of the release given by this article is designed to be exercised and shall be exercised only in case of the said railroad company's selling or contracting to sell the property so to be released because of its being no longer required for the uses or purposes of said railroad and requiring the same so to be released in order to give a perfect title to the purchaser or purchasers: and provided further, that when such released premises shall have been thrown out of use or ceased to be required, by reason of change of the line of the road, or change of depot grounds, building or other accommodations, the substitutes therefor shall be conveyed by appropriate deeds to the trustee upon the trust and for the uses and purposes of this indenture, before the giving of such release under the power contained in this article. And the said trustee shall likewise have full power to allow the said party of the first part, its successors or assigns, from time to time, to sell and dispose of such portion of the equipment, machinery and implements which shall be at any time held or required for the use of said railroad, as shall have become worn out or unfit for
36 such use: provided, however, that the same shall be ade-

quately replaced by other equipment, machinery and implements; and, all such other equipments, machinery and implements which may be acquired in substitution as aforesaid shall by virtue and force hereof become and be, immediately upon the acquisition of the same, subject to the lien and operation of these presents, without any new conveyance or transfers or other act or ceremony whatever, but such new conveyance and transfer shall be given to the trustee or trustees if it or they shall require or request the same.

The said party of the first part doth hereby promise, covenant and agree to and with the said party of the second part and its successors in the trust hereby created, that while the said party of the first part shall remain in possession of the said railroad, it shall and will, from time to time, pay and discharge all taxes, assessments and governmental charges lawfully imposed upon the said lines of railroad and branches and other hereby mortgaged premises, or upon any part thereof, the lien of which might or could be held to be prior to the lien of these presents, so that the priority of this mortgage may be duly preserved, and that the said party of the first part shall not and will not do or suffer any matter or thing whatsoever whereby the lien of this indenture or mortgage might or could be impaired, until the said bonds hereby secured, with all interest accrued thereon, shall be fully paid and satisfied. And it is hereby covenanted, granted and agreed and these presents are upon the express condition that if the said party of the first part shall well and truly pay and satisfy the said bonds to the aggregate amount of five millions of dollars hereby intended to be secured as
37 aforesaid, or such of them as shall be issued, and the interest from time to time accruing thereon according to the tenor and effect of said bonds and the coupons or interest warrants accompanying the same, then this indenture and all and singular the estates, rights and interests hereby granted to or vested in the said party of the second part shall cease determine and become of no effect.

But if default shall be made in the payment of the principal or interest moneys mentioned in the said bonds or coupons, or any or either of them, or any part thereof, according to the tenor and effect of said bonds or coupons or either of them, and if such default shall continue for the period of three months, then and in that case the party of the second part and its successors in this trust (upon proper indemnification against costs and charges if they be so advised) is and are hereby authorized and empowered, upon the written request of the holders of one-fourth part of the said bonds then outstanding, in respect of which or the coupons upon which such default shall have been made, to enter into and upon, and take and hold possession of all and singular the premises estates, franchises rights, privileges and property hereby granted and conveyed or intended so to be, and in person or by one or more agents operate the said line of railroad, to make, from time to time, all such repairs and replacements as it or they may deem judicious and all such useful alterations, additions and improvements as the income coming

into his or their hands shall be adequate to pay for and to take and collect and receive all fares, freights, tolls, earnings, issues, profits and incomes of said lines of railroad and apply such fares, rates, tolls, earnings, issues, profits and income to the proper ex-
38 penses of holding, operating and managing the said line of railroad and premises and conducting the business thereof, to the payment of all taxes and assessments which shall be levied or assessed thereon or upon said premises and all necessary and proper repairs, replacements, alterations, additions and improvements upon said property and all expenses costs, charges and counsel fees in the premises of said party of the second part or its successors in the trust and a reasonable compensation for its or their services, and next to the payment of interest upon the said bonds, in the order in which such interest shall have become or shall become due, to the person holding the coupons evidencing the right to such interest, and after paying all interest which shall have become or shall become due, to apply the same to the satisfaction of the principal of the said bonds then due and unpaid but ratably and without discrimination or preference. And further if default shall be made in the payment of interest moneys mentioned in the said bonds or the coupons appertaining thereto, or any or either of such bonds or coupons, or in the payment of any part thereof, according to the tenor and effect of such bonds or coupons, or either or any of them and if such default shall continue for the period of six months, then immediately at the expiration of said six months, at the option of the holders of one-quarter part of the bonds outstanding hereunder, the whole principal moneys mentioned in and secured by the whole of the said bonds which shall be or become outstanding hereunder, together with the interest thereon, shall become and be considered as forthwith due and payable, although the period limited in such bonds for the payment thereof shall not then have expired; and thereupon, or if default shall be made in the payment of the principal of
39 said bonds or any of them, or any part thereof, at the maturity of such bonds, the said party of the second part, or its successors in the said trust, may and it and they are hereby authorized and empowered and directed to cause the whole of the said premises, estates, franchises, rights, privileges and property hereby granted and conveyed or intended so to be, with their appurtenances and all benefit and equity of redemption of the said party of the first part and its successors and assigns therein or thereto, to be sold at public auction in the city of New York or the city of Toledo, giving at least sixty days' previous notice of the time and place of such sale by publishing the same at least once in each week during such period of sixty days, in two newspapers published in each of the cities of New York and Toledo and give such other notice of such sale as may be required by law, if any notice be so required. And it shall be lawful for the said party of the second part or its successors in the trust making such sale and it and they are hereby authorized and empowered as the attorneys or attorney of the party of the first part, by these presents duly constituted and appointed for that purpose, to make, execute and deliver to the purchaser or pur-

chasers on such sale all such deeds and conveyances as shall be necessary or proper to convey and assure to and vest in him or them the said premises, estates, franchises, rights, privileges and property and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part and its successors and assigns therein or thereto and such sale and the deeds and conveyances so to be thereupon executed shall be valid and effectual forever and shall be a perpetual bar, both in law and in
40 equity, against the said party of the first part and its successors and assigns and against all persons claiming or to claim by, from or under it or them or any of them. And it is further declared and agreed that the receipt of the trustee or trustees who shall make the sale hereinbefore authorized, shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase-money, and that such purchaser or purchasers, his or their heirs or assigns or personal representatives, shall not, after paying such purchase-money and receiving such receipt of such trustee or trustees therefor, be obliged to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase-money by the trustee or trustees.

And it is hereby declared and agreed that the said party of the second part or its successors in the said trust shall, out of the proceeds of such sale, or of any sale which shall under judicial proceedings or otherwise be made of the said premises, in enforcement of the security afforded by these presents, in the first place pay and retain the costs and expenses attending such sale, and all counsel fees and other expenses incurred by it or them in reference to the same and a reasonable compensation for its or their own services in the premises and also any balance which may be due to it or to them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by it or them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management and
41 shall apply the residue of the proceeds of such sale, or so much thereof as may be necessary, to the payment of interest upon said bonds in the order in which said interest shall have become or shall become due, ratably to the persons holding the coupons evidencing the right to such interest: and after paying all interest which shall have become due to apply the same to the satisfaction of the principal of the said bonds which, may be at that time due and unpaid, ratably and without discrimination or preference. And it is hereby further provided, declared, granted and agreed that upon the happening of such event or events as is or are hereinbefore declared, agreed or provided to authorize the said party of the second part, or its successors, to sell the said premises, estates, franchises, rights, privileges and property or to take the requisite proceedings to that end, the said party of the second part, or its successors, shall be entitled in their discretion, instead of taking proceedings for and making sale of said premises, estates, franchises, rights, privileges

and property, under and in virtue of the power of sale hereinbefore contained to proceed by bill in equity or other appropriate proceedings in any court or courts of competent jurisdiction of the United States or of the State of Ohio to foreclose this mortgage and enforce the rights, liens and securities of the trustee and bondholders thereunder: and thereupon said trustee, or its successors, shall be entitled to have the said premises, estates, franchises, rights, privileges or property hereby granted or conveyed or intended so to be, sold by judicial sale under the order or decree of such court or courts for or toward the satisfaction of the principal and interest due or
42 owing upon the then outstanding bonds issued under or entitled to the benefit of the security of this mortgage and for the enforcement of the rights, liens and securities of the trustees and the bondholders and shall be entitled to a receivership pending any such suit or proceedings of such premises, estates, franchises, rights, privileges and property and of the fares, freights, tolls, earnings, issues, profits and income thereof: and in case of such judicial sale the net proceeds thereof shall be applicable and distributable in like manner, as hereinbefore provided in respect of the net proceeds of a sale of such mortgaged premises and properties, rights, and franchises under and in virtue of the power of sale hereinbefore contained: and all the stipulations and provisions in this indenture contained with reference to or consequent upon a sale of such mortgaged premises and properties, rights, immunities and franchises when or if sold under said power of sale, shall be applicable and applied as far and as nearly as may be, in case of such judicial sale being made under the order or decree of the court. And it is hereby further provided, declared and agreed, that in case of such sale as is hereinbefore authorized being made by the party of the second part, or its successors in said trust, or in case of any judicial sale being made of the said premises, properties, rights and franchises, hereby mortgaged or any part thereof, in enforcement of the mortgage lien hereby created, the purchaser or purchasers at such sale shall be entitled, in making settlement for and payment of the purchase-money bidden at such sale, to turn in or use toward the payment of such purchase-money the bonds held by such purchaser or purchasers to or towards the payment whereof the net proceeds of such sale shall be legally applicable, reckoning such bonds
43 or the amount so turned in or used of the same for such purpose, at such sum as shall be payable out of the net proceeds of such sale to such purchaser or purchasers as holder or holders of such bonds, for his or their just share or proportion of such net proceeds of sale, upon the apportionment of and concerning such net proceeds, due receipts and acknowledgments being thereupon given by the holders of such bonds for the amount thus realized thereon, by reason of turning in or using the same as aforesaid and the said bonds being (if the net proceeds of such sale shall be sufficient to extinguish them) delivered up to the person or persons making the sale and entitled to receive payment of the purchase-money, or (if such net proceeds shall only suffice to make a partial payment of said bonds) due endorsement being made upon said bonds of the

amount so realized on account thereof. And the said party of the first part doth hereby further covenant, promise and agree that in the case of any default on its part as aforesaid, it will not set up claim or seek to take advantage of any valuation, stay, extension, redemption or other law or laws which may then exist, in order to prevent or hinder the enforcement or foreclosure of this mortgage, or the absolute sale of the said mortgaged premises as hereinbefore provided without and free from any appraisement, valuation, stay, right of redemption or other condition or hindrance, but will, and hereby does, waive the benefit of any and all such law or laws and consent and agree that a sale of the said mortgaged premises under these presents shall have immediate effect, and shall vest in the purchaser thereof an absolute title to the said premises, upon the payment of the purchase-money by him and the completion of his purchase.

44 And the said party of the first part, for itself, its successors and assigns, hereby agrees to waive and doth hereby irrevocably and absolutely waive and relinquish, the benefit or advantage of any and all valuation, stay, appraisement, extension, or redemption law or laws now existing or which may hereafter be passed by the State of Ohio, which, but for this provision, agreement and waiver, might be applicable to the sale hereinbefore authorized to be made by the trustee of the said railroad and other mortgaged premises, or to any judicial sale which may be made of the said mortgaged railroad and premises or any part thereof, under and in virtue of the judgment or decree of any competent court in a suit instituted for the foreclosure of this mortgage or for enforcement of the lien by this indenture created.

And the said party of the first part, for itself, its successors and assigns, agrees to waive and doth hereby irrevocably waive any and all right of redemption which it might or could otherwise have or be entitled to under any present or future laws of the State of Ohio, upon or after or in respect of any sale of the said hereby mortgaged premises, properties, rights and franchises, or any part thereof, which may be made either by the trustee or trustees, under the power hereinbefore contained, or at a judicial sale under order or decree of the court in a suit for foreclosure of this mortgage or enforcement of its lien as aforesaid; and the said party of the first part hereby covenants that it will not in any manner set up or seek to take the benefit or advantage of any such present or future valuation, stay, appraisement, extension or redemption law, to prevent or hinder or delay the absolute or irredeemable sale of said

45 mortgaged premises, properties, rights and franchises, as hereinbefore authorized to be made by the trustee, or as might but for such law be directed or decreed by a court of competent jurisdiction.

It is understood and agreed by and between the parties hereto that no individual liability shall attach to any present and future stockholders of the party of the first part in behalf of the holders of any bonds secured by this mortgage or deed of trust and that the holders of said bonds rely solely on the property, rights and fran-

chises of the party of the first part conveyed by this mortgage and the stipulations and covenants of the said party of the first part herein contained for the payment of the principal and interest of bonds so held by them.

And the said party of the first part, for itself, its successors and assigns, doth hereby covenant, grant and agree to and with the said party of the second part and its successors in this trust, and to and with the respective persons and corporations who shall at any time become holders of the said bonds hereby secured, or any of them, that the said party of the first part, its successors and assigns shall and will at any time, and from time to time hereafter upon request, make, do, execute and deliver all such further and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents and to assure and confirm to the said party of the second part, or its successors, all and singular, the property and estate, real and personal, and rights, privileges and franchises hereinbefore described and hereby intended to be granted and so as to render the same, and especially such portions thereof as shall hereafter be acquired by the said party of the first part, available for the security and satisfaction of the
46 said bonds according to the intent and purpose herein expressed. And it is hereby further provided, declared and agreed that the trustees under this indenture or any of its successors, may at any time be removed from the trust by instrument or concurrent instruments in writing, executed under the hands and seals of the holders of a two-thirds part in amount of the then outstanding bonds secured hereby, or their attorneys-in-fact thereunto duly authorized; and that any vacancy in the office of trustee, whether so created or arising from resignation, insolvency, incapacity or any other cause, may be filled by the appointment of one or more competent persons or corporations, as new trustees or a new trustee, by an instrument or concurrent instruments, in writing, executed under the hands and seals of a majority in interest of the holders of the then outstanding bonds secured hereby or their attorneys-in-fact thereunto duly authorized and that an appointment so made shall supersede and take precedence of any appointment made in any other way whatsoever, provided the party of the second part shall have first been paid all fees, charges and expenses at the time due it and all charges and expenses for which it may at the time be liable by reason of its execution of any of the trusts by these presents created.

In case after notice of such vacancy and of the present right of the bondholders to fill the same, shall have been published in two newspapers of general circulation in New York and two in Toledo for sixty days, the bondholders shall fail to fill such vacancy by an appointment made as hereinbefore prescribed then the board of directors of the party of the first part shall make a temporary appointment for such vacancy which shall continue until the holders of a majority in interest of the then outstanding bonds se-
47 cured hereby, or their attorneys-in fact thereunto authorized, shall designate a new trustee or new trustees to act hereunder.

And it is hereby covenanted and agreed, that any new trustee or trustees appointed as aforesaid, shall upon their, his or its appointment and without any further act, deed or conveyance become and be vested with all the estates, trusts, rights, powers and duties of the trustee in whose place they, he or it shall have been appointed, upon payment as aforesaid but, nevertheless, the respective parties hereto, and their respective successors and assigns, shall and will, upon request and payment as aforesaid, make, execute and deliver all such releases, conveyances and assurances as shall be appropriate to vest in and confirm and assure to such new trustees or new trustee such estate, trusts, rights, powers and duties according to the intent above expressed. And it is further understood and agreed by and between the parties to these presents, that the trustee under this indenture is entitled to reasonable compensation for all services rendered hereunder and that in case the party of the second part or its successors in said trust shall, upon default made, take possession or make sale of the said premises in pursuance of the provisions herein contained, it or they shall be entitled to receive and retain, from the income and proceeds of the said premises a reasonable compensation for its or their services in the care and management of the said premises and a reasonable compensation for the sale thereof as aforesaid.

It is further covenanted and agreed by and between the parties hereto that said party of the second part will from time to time, on request of the said party of the first part in writing signed by its president and secretary, with its corporate seal affixed, certify
48 and deliver said bonds to said officers or on their order, as the same may be required.

And the said party of the second part does hereby accept the trust conferred upon it by these presents, but with the understanding and it is hereby expressly provided and agreed that it shall not be liable or accountable for the acts, defaults or neglects of any agent or agents who may be appointed under and by virtue of, or for the purposes of these presents, to do any of the matters or things herein provided for, and that no other liability nor responsibility shall under any circumstances be borne by or attached to it than for the exercise of reasonable diligence only in the performance of the said trusts, when action on its part for that purpose shall become necessary and the request or requests and indemnity herein provided for, shall have been duly made and given to it. And it is further understood and agreed by and between the parties to these presents that in case the party of the second part or its successors in said trust, shall upon default made take possession or make sale of the said premises in pursuance of the provisions hereinbefore contained, all of the books and papers of the said party of the first part in any way relating to the said railroad or its equipment, or the operation or management of the same shall, upon request, be delivered by the said party of the first part, its successors or assigns to the said party of the second part, or its successors in said trust at the time being: and that it or they, by itself or themselves or any agent or agents employed by it or them, may take possession of such books

and papers and hold and use the same without any hinderance or impediment whatsoever by or on the part of the party of the first part, its successors or assigns or of any persons acting or claiming
49 to act under it or them or any of them. And the said party of the first part doth hereby covenant and agree to and with the said party of the second part and its successors in this trust and to and with all persons and corporations who or which shall become or be lawful owners or holders of any of the bonds issued and secured hereunder, that so long as any of the said bonds shall remain outstanding, the said party of the first part shall and will maintain and keep up a transfer agency in the city of New York and also a transfer agency in the city of Toledo, at each of which agencies all of the said bonds secured hereby shall upon request of the holders hereof be entitled to be registered in the name of such holder upon a book of said company, to be there kept for that purpose and to have endorsed thereon by the transfer agent a certificate or statement of being so registered and such bonds shall be transferable upon such registry by the registered owner, or his lawful attorney, which transfers shall be noted on the bond by endorsement of said transfer agent. Whenever a bond is so registered the holder may surrender the coupons and the coupons so surrendered shall be cancelled and the interest upon such bonds shall thereafter be payable only to the registered owner of the bond at the time being, or his lawful attorney, but a bond may be registered without surrendering the coupons, in which case the coupons of the bond will be payable to the bearer thereof upon presentation, and will be negotiable by delivery as if the bond were not registered.

Any bond registered without surrender of coupons may at any time be transferred on the registery to the bearer, after which it shall again be negotiable by delivery as if it had never been
50 registered and it shall still be entitled to be again registered in the name of the owner for the time being in like manner and to the like effect as if the previous registration had never taken place.

In witness whereof, the parties hereto have caused their respective corporate seals to be hereunto affixed and attested by their respective secretaries and these presents to be signed by their respective presidents, the day and year first above written.

[CORP. SEAL.] THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO.,
By F. A. WHITE, *Prest.*

Attest: E. C. WHITE, *Secretary.*

AMERICAN LOAN AND TRUST COMPANY,
By R. N. HAZARD, *Prest.*

Attest: W. D. SNOW, *Secretary.*

STATE OF NEW YORK, }
County of New York, } ss:

Be it remembered that on this 26th day of May, A. D. 1885, before me, Chas. Nettleton, a commissioner of the State of Ohio in and for the State of New York, residing in said city of New York, personally appeared Francis A. White, the president of the said Toledo, Columbus & Southern Railway Company aforesaid, and Creda E. White, the secretary of the same company, to me respectively personally known to be such, who, being by me severally duly sworn, did depose and say that he, said Francis A. White, resided in New York city, N. Y.; that he, said Creda E. White, resided in same city of New York; that he, said Francis A. White, was the president, and that he, the said Creda E. White, was the secretary, of the said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate
51 seal; that it was so affixed thereto by order of the board of directors of said company, and that they, the said Francis A. White and Creda E. White, signed their names thereto by the like order as pre-ident and secretary of said company respectively.

In witness whereof I have hereunto set my hand and affixed my seal this 26th day of May, A. D. 1885.

CHARLES NETTLETON,
Commissioner for Ohio in New York. [SEAL.]

STATE OF NEW YORK, }
County of New York, } ss:

Be it remembered that on this 26th day of May, A. D. 1885, before me, Charles Nettleton, a commissioner for the State of Ohio to take the acknowledgement and proofs of deeds, etc., to be used and recorded therein, personally appeared Francis A. White, the president of the Toledo, Columbus and Southern Railway Company, and Creda E. White, the secretary of the same company, who, being duly sworn according to law, do depose and say that they were personally present at the execution of the foregoing instrument and did see the common or corporate seal of the said Toledo, Columbus and Southern Railway Company affixed thereto; that the seal so affixed is the common or corporate seal of the said Toledo, Columbus and Southern Railway Company and was so affixed by the authority of the said corporation as the act and deed thereof; that he, the said Francis A. White, is the president of the said corporation; that he, the said Creda E. White, is the secretary of the same corporation, and that they did sign the said instrument as the president and secretary thereof, and that the names of these deponents above signed in attestation of the due execution of the said instrument are of
52 these deponents' own proper handwriting.

Subscribed and sworn to before me this 26th day of May, A. D. 1885.

Witness my hand and official seal.

CHARLES NETTLETON,
Commissioner for Ohio in New York. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss.:

Be it remembered that on this 29th day of May, A. D. 1885, before me, Henry E. Doremus, a notary public of the State of New York in and for the county of New York, residing in said county, personally appeared Roland N. Hazard, president, and Wm. D. Snow, secretary, of the American Loan and Trust Company of New York, trustee named in the foregoing mortgage and deed of trust, and personally known to me to be the president and secretary of said American Loan and Trust Company of New York, and whose names are subscribed to the foregoing instrument, and did each for himself acknowledge that in his official capacity and in behalf of said American Loan and Trust Company of New York he did sign, seal, and execute the same for the uses and purposes therein mentioned.

In witness whereof I have hereunto affixed my hand and official seal this 29 day of May, A. D. 1885.

H. E. DOREMUS,
Notary Public, Kings County. [SEAL.]

53 EXHIBIT "B."

I, C. E. White, secretary of the Toledo, Columbus and Southern railway, do hereby certify that at a special meeting of the stockholders of such corporation, duly called and held according to law, at Toledo, Ohio, April 9, 1885, the entire share capital of said company was represented, and by the unanimous vote of all the stockholders the following resolution was passed:

Resolved, That it is the sense of the board of directors of this company that to enable it to extend and complete its said line of railroad from its present terminus at Findlay, Ohio, to the terminus named in the proceedings for the extension thereof, to wit, Belpre, in the county of Washington and State of Ohio, and to equip, complete, and perfect the same with necessary rolling stock, machinery, side tracks, connections, depots, shops, and all needful appurtenances and apparatus to said company, should issue its bonds to the number of five thousand of one thousand dollars each, payable to the American Loan and Trust Company of New York, trustee, or bearer on the first day of July, 1925, in gold coin of the present standard weight and fineness, at the office of the financial agent of this company, in the city of New York, and interest from the first day of July, 1885, at six per cent. per annum, payable semi-annually at the office of the said financial agent on the first day of January and first day of July of each year in like gold coin, such interest to be payable until the payment of the principal sum, to be evidenced by coupons to be attached to such bonds, with a condition that if default be made in the payment of such interest and said default continue the principal sum may be declared due, with
54 waiver of all stay, exemption, extension, and appraisement laws, and that said bonds be secured by and be of equality

and without preference by reason of priority of issue or cause or thing soever and all equally protected, and payment thereof secured by a first mortgage or deed of trust of even date therewith duly executed and delivered by this company to the American Loan and Trust Company, trustee, conveying the railway of this company in the State of Ohio, extending from the city of Toledo, in Lucas county, through the counties of Lucas, Wood, Hancock, Hardin, Franklin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs, in said State, to a point on the Ohio river opposite Parkersburgh, West Virginia, a distance of two hundred and fifty miles, more or less, with all the equipment, appurtenances, revenues, franchises, privileges, immunities, tolls, incomes, licenses, rights of way, leases, grants, canals, wharves, docks, boats, shops, equipments, choses in action, and all other property, real and personal and mixed, of the said railway company now owned or hereafter to be acquired by it, the said mortgage to be a first lien upon said property, and that eight hundred of said bonds be issued to take up and cancel the bonds of this company already issued to Francello G. Jillson or bearer and the mortgage securing the same according to the tenor of said bond and mortgage and as many more as may be necessary to pay accrued interest thereon; that the proposition to so issue said bonds and mortgage or trust deed be submitted to the stockholders, and when approved by them that the president and secretary of this company be, and they are hereby, authorized without further action of or authority from this board to execute said bonds
55 and mortgage under the corporate seal of the company and to deliver the same to the trustee aforesaid for the proper certificate.

And whereas this meeting and all of the stockholders aforesaid are fully advised of the nature, extent, purpose, and advisability of the action aforesaid, do hereby adopt, ratify, and approve the said resolution of the said board of directors, and do hereby authorize the president and secretary of the company, for and in its behalf and under the corporate seal, to make and execute and the said board of directors to issue, sell, negotiate, and deliver the said bonds described in the resolutions aforesaid, being five million dollars of the bonds of this company, being five thousand in number and of one thousand dollars each, and to secure the said bonds by the mortgage of this company upon all its property aforesaid, both that which it now has and which it may hereafter acquire, and that eight hundred thousand dollars of said bonds be used for the purpose of taking up the bond now outstanding and issued to Francello G. Jillson or bearer and secured by mortgage upon the property of this company and causing the same to be cancelled and discharged of record, and if necessary enough of said bonds shall also be issued to pay the interest on the said eight hundred thousand dollar bond from its date to the date of the redemption as aforesaid.

And said directors, through the said president and secretary, or the said president and secretary shall, and they are hereby authorized to, adopt and agree to the form of said mortgage or trust deed

to secure the bonds aforesaid, inserting therein such clause and conditions as they may deem just and proper, with such waivers, conditions, stipulations of forfeiture, powers of the trustee in
56 case of forfeiture or failure to pay the debt or otherwise perform the conditions thereof, as are usual in such mortgage or which, whether usual or not, they deem proper and just; and said directors are hereby authorized to determine and decide when, how, and in what lots or amounts said bonds shall be issued and sold or disposed of, providing, however, that they shall stand equally secured, notwithstanding the time of their issue and sale. The said bonds and mortgages are intended to be used and disposed of for the purpose of extending and completing and equipping the line of this company's railroad and acquiring terminal property and facilities and to represent a bonded indebtedness of twenty thousand dollars per mile of completed and equipped railroad, exclusive of the cost of said terminal property and facilities, and are to be used for that purpose alone, but the directors are invested with the power of deciding and determining when and in what amounts the said bonds shall be issued and sold, as well as the terms of said sale and issue, for the purpose aforesaid.

Witness my hand and the seal of said corporation hereto affixed this 22 day of April, A. D. 1885.

[SEAL.] C. E. WHITE, *Secretary.*

STATE OF OHIO, } ss:
Lucas County, }

The foregoing deed was filed for record in the office of the recorder of Lucas county, in the State of Ohio, on the 3rd day of June, A. D. 1885, at 2.30 o'clock p. m., and duly recorded in Book 100 of Mortgages, on pages 465-483 *et seqnitur.*

Recorded June 8, 1885.

CHAS. J. KIRSCHMER, *Recorder.*

57 Afterwards, to wit, on the 14th day of April, A. D. 1886, there was filed in the clerk's office of said court the following motion, to wit:

Motion for Receiver and Preliminary Injunction.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST CO.
vs.
THE TOLEDO, COLUMBUS & SOUTHERN R'W'Y CO. and THEOPHILUS P. BROWN. } In Equity.

And now comes The American Loan & Trust Company, the plaintiff, and moves the honorable the judges of said court for an order at chambers appointing a receiver of The Toledo, Columbus & Southern Railway Company, defendant, and a preliminary injunc-

tion against the defendant as prayed in said bill and upon the grounds therein stated and in the affidavits on file in support thereof.

58 Afterwards, to wit, on the 15th day of April, A. D. 1886, there was duly entered on the chancery order book of said court the following order, to wit:

Order for Hearing on Appointment of Receiver, &c.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*

On motion of plaintiff herein and on good cause shown, it is ordered that the application of plaintiff, The American Loan and Trust Company, for the appointment of a receiver herein according to the prayer of the plaintiff's bill of complaint, and also for a preliminary injunction according to the prayer of said bill in the above cause, be set down for hearing at chambers on the 22nd instant, at 10 o'clock a. m., in the room of the circuit court of the United States for the northern district of Ohio, eastern division, in the city of Cleveland, Ohio; and it is further ordered that the defendants, on or before the 19th instant, file any affidavits or other evidence counter to the bill and affidavits which have been filed by the plaintiff in support of its said applications, and that the plaintiff, on or before the 21st instant, file any affidavits or other evidence which it may file in reply to such counter-affidavits of the defendants.

DONE in vacation, at chambers, in the city of Cleveland, Ohio, this 16th day of April, 1886.

M. WELKER,
Dist. Judge U. S., said Dist.

59 Afterwards, to wit, on the 15th day of April, A. D. 1886, there was issued from the clerk's office of said court to the marshal a duly certified copy of said order, and on the 19th day of April said order was returned and filed with the following return made by the marshal, to wit:

NORTHERN DISTRICT OF OHIO, *ss.*:

On the 15th day of April, 1886, at 9.30 o'clock a. m., at Toledo, Ohio, I delivered a true and duly certified copy of the within order to Theophilus P. Brown, as president of the Toledo, Columbus and Southern Railway Company, and at same time and place I delivered a like copy to Theophilus P. Brown.

W. F. GOODSPEED,
U. S. Marshal,
By WM. BREED, *Deputy.*

60 Afterwards, to wit, on the 19th day of April, A. D. 1886, there was filed in the clerk's office of said court the following amendment of bill, to wit:

Amendment of Bill.

The Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN.

And now comes the plaintiff, The American Loan and Trust Company, and amends its bill in the above cause by adding the following matter to the prayer thereof, to be inserted immediately before the prayer in said bill for general relief, viz:

The plaintiff, The American Loan and Trust Company, further prays that an account may be taken under the order and direction of this honorable court of what is due and owing to the plaintiff for interest on said bonds and mortgage; that defendant The Toledo, Columbus and Southern Railway Company pay the plaintiff what may be found due it on taking said account, together with its costs of said suit, by a short day to be appointed by the court for that purpose, or in default thereof that the said defendant corporation and all persons claiming under it subsequent to the commencement of this suit may be foreclosed of all equity of redemption or other interest in said mortgaged property, effects, franchises, and rights, and that the same be sold and the proceeds applied to the pay-
61 ment of the costs and expenses of this suit and the amount due as well as the amounts to become due on said bonds and mortgage.

And the plaintiff further prays that the defendant corporation and said Brown may be temporarily enjoined from selling or disposing of in any way the said mortgaged property, effects, rights, and franchises or any interest in or part thereof, and that on final hearing such injunction may be made perpetual.

S. A. BOWMAN,
R. A. HARRISON,
Solicitors for Plaintiff.

62 Afterwards, to wit, on the 20th day of April, A. D. 1886, there was filed in the clerk's office of said court the following answer, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN. } Answer.

Answer of Theophilus P. Brown, one of the defendants, to the bill of complaint of The American Loan and Trust Company, complainant.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill, for answer thereto, or unto so much or such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, saith—

That he admits that the complainant is a body corporate under the laws of New York and a citizen of said State; that the defendant The Toledo, Columbus and Southern Railway Company is a body corporate under the laws of Ohio and owner of a line of railroad from Toledo to Findlay, and engaged in operating the same as alleged, and that this answering defendant is a citizen resident of the State of Ohio.

He denies that the Toledo, Columbus and Southern Railway Company was incorporated with an authorized capital stock of five million dollars to build and operate a railroad from Toledo through the city of Columbus to the village of Belpre, on the Ohio river, or that in payment for the purchase of that part of the com-
63 pleted road from Toledo to Findlay it issued its bonds to Francello C. Jillson for the sum of eight hundred thousand dollars as alleged, but on the contrary says that said bonds were issued and a mortgage to secure the same executed in accordance with and only for the purpose hereinafter stated.

He admits the execution of the mortgage or deed of trust named in the complainant's bill of complaint. He denies that in pursuance of the terms of said deed of trust the said complainant has certified and delivered unto the said railway company one thousand of the bonds provided for in said deed of trust, of one thousand dollars each, but says that if any more than eight hundred and twenty-five of said bonds were thus certified it was a violation of the resolutions and provisions made therefor by the stockholders and board of directors of said defendant company and without any warrant or authority, and that if nine hundred and fourteen of said bonds had been negotiated and are outstanding (which he denies) the same was for any excess over eight hundred and twenty-five of said bonds done fraudulently and without any warrant or authority from said railway company and for the purpose of furthering the ends and purposes and the fraudulent design and scheme of Francis A. White, the American Finance Company, and the other parties combining and confederating with them as hereinafter specifically alleged. He

admits that eight hundred of said bonds were issued in the place of and to take up the eight hundred thousand dollars of bonds and the mortgage to secure the same first issued to said Francello G. Jilson, and that said last-mentioned mortgage has been cancelled of record.

He denies that in pursuance of the certificate of incor-
64 poration and the certificate for the extension of said line of railway and for any purpose whatever said railway company has caused this line of railway to be surveyed and located from said city of Findlay to a junction with the track of the Pennsylvania Railroad Company about 18 miles from the city of Columbus, or that he has contracted with any owner of land through which said line as alleged has been located for the right of way for any part of said extended line, or that any contracts have been procured by said company at great expense, or that any such contracts are valuable, whether paid for or not, or that any rights of way have been procured by the company, and defendant alleges that if any such contracts have been made or any such proceedings or steps taken it was done without the knowledge of the board of directors of said company and in violation of a resolution passed by the board of directors that no contract for the extension of said railroad or procuring the right of way should be binding upon the company until first submitted to and approved by said board of directors.

He denies that if said railroad is built to said junction any permanent or advantageous arrangement can be made by it with the Pennsylvania Company for the use of its track into the city of Columbus, or that any parties stand ready to purchase any securities of said defendant railroad company to enable it to extend said line of railroad to the said city of Columbus, or that they would do so but for the acts of said Brown or the others as charged in said bill of complaint.

He admits that he has since the organization of said railway company been a member of said board of directors; that he has been the general manager of said railway and in charge thereof as such,

but he denies that he procured himself to be elected a di-
65 rector and general manager, or that he procured contracts for a future interest therein by reason of any of the representations in said bill of complaint mentioned, or by representing that he was in favor of and that he would labor to promote the extension of said road; but, on the contrary, alleges that his interest in said railway is shown by the contracts under which the same was purchased at the judicial sale and the reorganization thereof affected, which contracts are hereinafter more specifically set forth.

He denies that he entered into any secret combination with the Columbus, Hocking Valley and Toledo Railway Company and the Toledo and Ohio Central Railway Company, parallel and competing lines, or with persons largely interested therein to defeat the extension of the said railroad, or that on the 25th of March, 1886, the day of the annual election of the directors for the defendant railway company, the said defendant secretly and fraudulently, either by himself or in connection with any of the others named in said bill,

procured the order of injunction therein alleged. He admits that he did file a petition in the court of common pleas of Lucas county setting up his interest in the stock of said railroad and the fraudulent combination to deprive him of the advantages which said stock legally gave him, and which, under the contracts hereinbefore and hereinafter referred to, he was lawfully entitled to, and alleging that he had commenced an action in the supreme court of the city of New York against the American Finance Company, Francis A. White, Israel B. Mason, Francello C. Jilson, and others seeking to obtain from them his lawful right in the premises which they had denied him, and that in said action and upon due notice the American Finance Company and its officers and agents and all the
66 other defendants to said action were restrained until the further order of court from voting upon said stock in said order described, a copy of which order is attached hereto and made a part hereof, and that said Francis A. White, who was the vice-president of said American Finance Company, has caused himself to be elected president of the defendant railway company in violation of the contracts aforesaid and the rights of said Brown as a holder of a large majority of the stock of said railroad, intended to violate said injunction, expected to be at the annual meeting aforesaid, and intended fraudulently and without lawful authority to vote said stock for the purpose of ousting said Brown from participation in the management and control of said railroad, in which he was more largely interested than all other- combined.

He admits that at the said annual election for directors he caused, by voting upon stock which he was lawfully the owner of and entitled to vote upon, the election of Alexander W. Scott as a director in place of Samuel R. Follett, who had previously been a director of said company, but he avers that the said Samuel R. Follett was never qualified or eligible as a director of said company; that he was a non-resident of the State of Ohio and a citizen of the State of New York, and that White, Mason, and Jilson, being also non-residents of Ohio, the board was made up, in violation of law, of a majority of its directors non-residents of said State of Ohio; that in addition thereto it was provided by the contracts aforesaid that the said defendant, Brown, should have the right to name a majority of the said board of directors, and that he should himself be elected the president of said company; that, in violation of said con-
67 tracts and his rights as the holder of a majority of said stock, the said American Finance Company, as hereinafter alleged, having fraudulently caused said stock to be issued in its own name because the said Francis A. White was the president of said railroad company and his son, C. E. White, was the secretary of said company, having possession of the stock books and ledgers of said company, elected the said board of directors and the general officers of said company as constituted for the year preceding the last annual election; and he denies that by reason of said election or of any combination, secret or otherwise, the defendant or the board of directors thus elected wrongfully and unlawfully has assumed control of said railway company for the purpose of defeating the extension

of said line of railway or for any other purpose than the lawful management and control of the said company's affairs.

The defendant is unable to state whether the allegation of said bill as to the persons in whose names the stock stands upon the books of said company is true or not, for the reason that, in violation of the laws of the State of Ohio and against the repeated protests of this defendant, the books of the company, including its records, certificate of incorporation, and the general records of the company, have been by the said Francis A. White and C. E. White taken from the general offices of the company, kept in the city of New York or elsewhere, and without the power of defendant to obtain access to them, but he avers that if any stock stands in the name of W. C. Lemmert, James M. Brown, Henry E. Lee, Frank A. Lee, C. F. Watts, George P. Kirby, M. C. Fogarty, W. G. Alexander, Judd Richardson, James S. Robinson, J. C. Chamberlain, E.
68 M. Brown, S. S. Teals, Charles Hutchinson, or Harvey Scribner, that the same were issued to said parties fraudulently, without authority from the board of directors, without subscription being made therefo or any authority to receive any subscription therefor, and because and for the purpose of the fraudulent combination hereinafter alleged, entered into by said parties with the said American Finance Company, Mason, Jilson, and White for the purpose of ousting said Brown and the lawful officers of said company from the management and control of said company's affairs, and for the purpose of evading and violating and ignoring the injunction granted in said cause in New York and pending the same.

The defendant further says that he denies that Israel B. Mason and Francello G. Jilson furnished all the money actually invested in the property of said railway company or any part thereof, or that they have now or ever have had an investment in said railway company of any money or thing whatever. He denies that the stock was so transferred to the American Finance Company, trustee, for the benefit and protection of said Mason and Jilson so as to secure the extension of said railroad as aforesaid, but he alleges that, as is hereinafter more specifically set forth, every dollar of the money used in the purchase, repair, and equipment of said railroad was the money of this defendant; that he borrowed the said money from the said Mason and Jilson, as shown by the contracts hereinafter, and executed his promissory notes therefor, which are now held by said Israel B. Mason, and secured the said notes by the transfer of the bonds of said railroad company as provided in said contract; that said notes have not yet matured;
that the semi-annual payment of interest thereon has been
69 promptly paid at a much greater rate, too, than they called for by the same; that no default has been made in any of said notes or any payment due thereon, and that it was provided in the contract under which said loan was made that so long as this defendant paid the interest on said notes no action should be commenced on any of the bonds of said company because of any default in payment of the interest on such bonds.

Defendant admits that if it were not for the injunction aforesaid,

granted by the court of common pleas in Lucas county, a board of directors other than the one elected would have been elected, made up of parties who have no interest in said railroad, but who would be the paid agents of the said American Finance Company and said Francis A. White for the purpose of speculating in the scheme or project of pretending to build a third parallel railroad from Toledo to Columbus, which would have been at all times a disastrous and unfortunate speculation for those interested in the present property of the defendant railway company and would have had no other effect than to dilute and depreciate the securities and property of the already constructed railroad.

Defendant denies that the election of directors at the annual election is null or void or that under the management of the board of directors thus elected the property of the railway company or its business is liable to suffer.

He denies that he has been engaged or is now engaged in diverting the legitimate business of the defendant company to the lines of the other competing roads so as to prevent it from paying its operating expenses and the interest on its bonds issued under the complainant's deed of trust, but he avers on the contrary
70 that under his management the business of said defendant railway has constantly increased and is still increasing; that instead of diverting business to competing railroads they are complaining that he is by all manner of devices obtaining business which legitimately belongs to them, and that he is obtaining business wherever he can legitimately do so for said defendant railway company, so that he is making the said road a success in its earnings beyond the expectation of any parties interested in it.

He denies that he is allowing and suffering the road-bed to become out of repair or that the rails are becoming bent or impaired; but, on the contrary, avers that said road-bed never was in as good condition as it is now; that he has been constantly repairing it, putting it in as perfect order as possible, which repairs are still being continued to be made, and the road-bed is still constantly improved.

He denies that he has been engaged in selling any ties from along the line of the road so as to deprive the company of ability to keep its line in repair, or that he will do so unless a receiver is appointed.

He denies that the Ohio Central Terminal Railway Company owns valuable terminal railway facilities at Toledo, but says that he has no knowledge as to who is the actual owner of said terminal facilities; that a suit has been commenced in the court of common pleas of Lucas county against said terminal railway company for the purpose of restraining it from asserting any claim of ownership to said property and quieting the title of plaintiff in said action, The Toledo & Ohio Central Railway Company. He admits that a lease was made by said terminal railway company to the defendant railway company for said terminal facilities, but he avers
71 that the defendant's lessor was not in possession and has not been able to put the defendant railway company in posses-

sion of said railway property, and has no line of railroad connecting with said property or over which access to said property can be obtained; that the only means of getting to said property or to any terminal facilities afforded to defendant railway company or possible to it is over a line of track belonging to the Toledo & Ohio Central Railroad Company; that said last-named company is in possession of said terminal property; that the use of the same is absolutely necessary to any business by the defendant company, and that a conflict with the said Toledo & Ohio Central Railway Company would result in a switch being turned against this company and it prevented from reaching any depot or other place within the city of Toledo for the purpose of receiving or discharging freight or passengers; that notice was served upon said terminal company by resolution of the board of directors that until the possession of said property should be given to the defendant company, The Ohio Central Railway Company in the meantime insisting upon rental, to wit, for the use of its track and for the privileges aforesaid, it would be improper and impossible for the defendant railway company to pay the rent under said lease; but that notwithstanding the fact that the lessor was unable to put the said lessee in possession of said property, the said Francis A. White, without authority of the board of directors, continued to pay to the terminal company rent under such lease up to and including the last month due thereunder; that inasmuch as the said terminal company has been unable to put the said lessee in possession of the leased property,

72 and inasmuch as the said lease has but a few months to run, and it is optional with either party to renew the same or not, and the Ohio Central Railway Company, who is in possession of said terminal property and who owns the only railroad connecting it with the line of defendant's railroad and who has the power to exclude the defendant company from the use of such track, is making no threat or effort to exclude the defendant company from the use of all of said property so long as it complies with the contract with said Ohio Central Railway Company made prior to said lease, the danger of forfeiting the said lease is purely imaginary, and no harm can arise to the said company from anything in connection with said lease.

Defendant denies that unless a receiver is appointed the said line of railway will become deteriorated in value; that its earnings will not pay its operating expenses; that the security of complainant's beneficiaries will be impaired or possession of said terminal facilities lost, any right of way belonging to said railway company forfeited, the rails injured or unfitted for use, the business of said company diverted, or the trust of complainant fail or be in anywise impaired.

The defendant says it is true that no interest has been paid on the bonds of said railway; but he says that no person is interested in said bonds except this defendant and said Mason and Julson, and except that the American Finance Company claims to be the owner of one of the notes of this defendant to said Mason for the sum of $10,000, and is thereby interested in the security of the bonds that were pledged to secure said notes; that the only persons who have

any interest whatever as beneficiaries under such deed of trust
73 are this defendant, Mason, Jilson, and the American Finance Company, the last named being limited to the said ten-thousand-dollar note; that all of said parties were parties to the tripartite agreement hereinafter mentioned and hereto attached; that by the terms of said agreement no action was to be commenced for any default of the interest upon said bonds during the life of said notes executed by this defendant to the said Mason and Jilson if the interest was paid on said notes; that the first instalment of interest on said notes matured in March, 1885, and was paid; the next instalment matured in September, 1885, and was paid; the third instalment maturing in March, 1886, on the ten-thousand-dollar note held by the American Finance Company was paid, and by the terms of said notes the interest was payable at the office of complainant, in New York city; that on the day of maturity of said interest the said defendant, by his agents in New York, tendered at the office of complainant the interest on all the said promissory notes, the aggregating of said notes being three hundred and fifteen thousand dollars; that the complainant refused to receive the same, saying that the notes were not there, and that prior thereto and immediately thereafter this defendant, through his agents in New York, the Central Trust Company, and also personally, telegraphed to Mason and Jilson that the interest was ready and would be paid whenever the notes were presented, either at the office of the complainant or the Central Trust Company of New York, and the money is now there for the purpose of paying the interest due on said notes in March, 1886, if it has not already been received by the holders of said nots.

That therefore defendant says that there being no other bene-
74 ficiaries under said trust deed than those who were parties to said contract that no action can be maintained by said trustee, the complainant, upon said trust deed by reason of any failure to pay the interest aforesaid. The defendant, therefore, denies that the bonds were negotiated with the coupons thereon, or that any of said coupons remain unpaid in fact, or that anything whatever is due or payable to the holders of any of said bonds. He denies that the railroad company is insolvent. He denies that twenty-seven thousand four hundred and twenty dollars or any other sum is due on said coupons, or that default thereon has continued for more than thirty days, or that any owners or persons interested in said bonds have requested the complainant to enter and take possession of said railroad or to enforce said mortgage, or that they have any right to do so. He denies that the complainant, in pursuance of said request, has demanded from the president of said company the possession of said property. He avers that he is the president of said company and that no such demand has been made. He denies that the mortgage security is insufficient to pay the indebtedness of said company, or that if it is any person will suffer thereby except this defendant. He avers that the only amount due to any person except this defendant by reason of said bonds is the sum of three hundred and twenty-five thousand dollars claimed to be due to said Mason and Jilson, but which this defendant denies;

that the question as to whether anything is due to the said Mason and Jilson or any person else upon said promissory notes by virtue of the various matters alleged by this defendant is now involved in an action pending in the city of New York, wherein this defendant is complainant, against the said American Finance Company, the American Loan and Trust Company, Francis A. White,
75 and said Mason and Jilson; that if any amount is found due to the said Mason and Jilson in said action or in any other action the security held by them is ample and more than ample to completely protect the same, and out of which the said parties can obtain full and complete satisfaction of said notes; and this defendant is ready at all times, upon the maturity of said notes, to pay the same in full if it shall be determined that anything is due thereon and the full amount of whatever is determined to be due from defendant.

The defendant denies that there is embarrassed condition of the railway company's financial affairs, but avers that the company is amply able to pay its current expenses and much more; that it has no indebtedness; that no person has a right to demand from the company any interest upon the coupons on said bonds until the maturity of the notes aforesaid, and that when that event happens the defendant expects to and is able to make arrangements for the full payment thereof; that there are no legal difficulties connected with said property that are not the result of the combination and conspiracy hereinafter mentioned to destroy the value of said property and its securities for the personal gain of those who have no financial interest in said railroad.

He denies that there is any difficulty in the trustee executing said trust without the aid of the court, or that there is any necessity for the appointment of a receiver in this case.

The defendant avers that during the pendency of the proceedings to foreclose the mortgage executed by the Toledo & Indianapolis Railway Company in this court, which railway company was
76 the owner of the said line of railway from Toledo to Findlay, this defendant, being largely interested in said railway company and its property, negotiated a loan from said Mason and Jilson through the agency of the American Finance Company for the sum of three hundred and twenty-five thousand dollars for the purpose of buying the claims against said railway company secured by its mortgage and for the purpose of enabling this defendant to buy said property and to protect his interest therein; that the contracts between this defendant and the American Finance Company and between this defendant and the American Finance Company and the said Mason and Jilson are hereto attached and made a part hereof; that by the terms of said contract it was provided—

1. That the money should be used by the American Finance Company for the purpose of buying up said claims; that the property should be purchased and that the bonds of the old company, or if a reorganization took place, of a new company, to the amount of six hundred and fifty thousand dollars should be pledged to the repayment of said three hundred and twenty-five thousand dollars;

that this defendant executed his promissory notes for said three hundred and twenty-five thousand dollars, payable in two years from date, the said notes being dated September 24, 1884, with semi-annual interest; that the money thus obtained by this defendant upon his promissory notes and the security aforesaid was the money of this defendant and was the money used for the purpose of buying and equipping said railroad.

2. That it was provided that the stock of the said railroad should be issued, whether of the old company or of the reorganized company, so as to give this defendant a majority of said stock,
77 and that he was to have the right to name four of the seven directors of said company and to be himself elected president thereof.

That in pursuance of said contract the road was purchased at the judicial sale aforesaid and the money paid for the same, and also all the money for the purpose of making repairs and purchasing necessary equipment was the money thus borrowed by or contributed and paid by said Brown; that it was provided also in said contract that the said American Finance Company should negotiate certain bonds to be provided for the extension of said railroad company, provided they did so within one year from the date of said contract, and if they did not do so within that time, then Brown was to have the right to terminate that part of the agreement providing for such extension; that the American Finance Company wholly failed to make any negotiation for said bonds providing for said extension or to provide any money therefor within the time named, and said Brown in writing notified them of the termination of the contract in that respect after the expiration of the time therein provided; that said American Finance Company never had and has not now a dollar of money invested in said railway company or its property; that after the reorganization of said company and for the purposes of its temporary organization by the election of officers Francis A. White was elected its president; that a board of directors was elected consisting of the present board (excepting said A. W. Scott) & Samuel R. Follett; that after the organization was perfected this defendant insisted and demanded that the terms of said contract should be complied with in respect to the election of a board of directors, four of whom should be named by him, and that he should be elected the president thereof, but the American Finance Company, Fran-
78 cis A. White, its vice-president, said Mason and Jilson, who are stockholders and directors of said American Finance Co., conspiring together to defraud this defendant and to eventually squeeze his out of the said corporation and of his interest therein, caused the son of said Francis A. White to be elected the secretary of said company, removed all the books, records, and papers of the company from its general offices at Toledo to the city of New York, and thereupon caused the stock of said company, except one share to each of the directors, to be issued in the name of the American Finance Company, trustee, thereby giving to said White, Mason, and Jilson the entire voting power of the corporation; that defendant repeatedly in writing protested against this action and de-

manded, both in writing and verbally and personally and through his attorney, that the said contract should be carried out and the stock issued as provided, but the said parties refused; that prior to the annual election for the year 1886 the defendant, fearing that the stock aforesaid thus issued in the name of persons having no interest therein and for the fraudulent purpose, as defendant believes, of voting him out of the company and defrauding him of his interest therein, personally and by attorney, in the city of New York, demanded of Israel B. Mason and the American Finance Company that the stock should be issued as provided in said contract, and that the certificates thereof should then be left with the American Finance Company, as provided in said contract and as security, but that the same was refused; that thereupon this defendant commenced his action in the supreme court of the city of New York, as hereinbefore alleged; that afterwards and just before the said annual election, defendant being informed that said White and said finance company intended to disregard the
79 injunction aforesaid and the said White coming to Toledo on the night before the annual election, the defendant commenced his action aforesaid in the court of common pleas to restrain the said White and his confederates from voting said stock; that in addition to the stock mentioned in said contract it was provided that this defendant should make and extend the line of road from its terminus in Findlay to the railroad of the Indiana, Bloomington & Western Railway Company, for which he was to receive twenty thousand dollars a mile in the bonds of the company and twenty-five thousand dollars a mile in the stock of said company; that said extension was made by this defendant, and thereupon there was issued to him the bonds of the company in the sum of twenty-five thousand dollars and the stock of the company in the sum of thirty-two thousand five hundred dollars, which stock stood in his name upon the books of said company; that thereupon at the annual election the said Brown, for the purpose of carrying out in good faith his said contract aforesaid, voted all of his stock in favor of a board of directors consisting of the said Francis A. White, Israel B. Mason, and Francello G. Jilson, the other four being named by this defendant, consisting of the same persons as the former board except the said Samuel R. Follett, and naming said Scott in his place; that said Samuel R. Follet had several months before the election gone back to the city of New York, where he has continued to remain, and that he never was in the State of Ohio to the knowledge of this defendant except when he was sent here by the said Francis A. White at the time of his election as a director, and remained at Findlay under a salary from the company during a part of the year during which he was a director; that the salary was paid him for the purpose of enabling him to remain in
80 Ohio ostensibly in the employ of the company, but really for the fraudulent and unlawful purpose of keeping a non-resident in the board of directors, while the balance of the board was equally divided between citizens of Ohio and citizens of other States.

The defendant says that the American Finance Company, through its officers and agents, devised the scheme of the extension of said line of railroad for the purpose of floating its bonds upon the market and receiving the commission and the profit that might result from such a speculation; that a resolution of the board of directors was introduced authorizing the president of the defendant company, the said White, who was also vice-president of the said finance company, to make contracts for the extension of said road, but that the board of directors refused to pass such a resolution except with the provision that no such contract should be binding upon the company unless it first received the approval of the board of directors; that no contract was ever submitted to the board of directors or was ever approved by it for the extension of said road or for the acquiring of any right of way or the incurring of any liabilities therefor; that when the said defendant exercised the option given him by said contract of terminating the contract with the finance company for such extension that said finance company and said White and his son, C. E. White, the secretary of the defendant company, with other persons conspiring and confederating with them, conceived the fraudulent design and purpose of ousting said defendant from the said railroad company, and for that purpose and without consideration or lawful authority caused the stock to be issued to the persons hereinabove named, who were either the
81 attorneys of said White and said finance company or of persons interested in said scheme or so engaged with the said White and the finance company in the fraudulent design aforesaid, and was so fraudulently issued for the purpose of enabling the parties aforesaid to vote at the annual election for the said parties, and said stock was so fraudulently issued as aforesaid to oust the legitimate owners of the stock and parties interested therein from the control and management of the company; that the stock books have been kept out of the office of the company and in the private possession and control of said White and the said finance company, together with all the other records aforesaid, although the law requires that all the books of the company be kept in the office of the company, which is to be located on its line of railroad, and although its general office was by resolution located and established at Toledo, where it now is; that if no notice was given by the secretary of the annual meeting of the stockholders for the election of directors it was omitted at the instance and request of said Francis A. White and by an arrangement between him and his said son, C. E. White, secretary of said company, for the purpose of aiding the said parties in the said conspiracy, but that it was not intended to regard the want of such notice as material by the said White and his associates, is shown by the fact, as alleged in said bill of complaint, that were it not for the injunction aforesaid a board would have been elected at said meeting in the interest of said parties and by the fact of the fraudulent issue of stock to the attorneys of said parties and their associates so as to enable them to become directors of said corporation, although having no interest whatever in it or its property.

The defendant admits that one of the directors aforesaid
82 is the attorney for the Toledo & Ohio Central Railway Company, but he avers that John H. Doyle, who is charged to be the attorney of the Columbus, Hocking Valley and Toledo, was a director of said company long before the times alleged in said bill of complaint; was the attorney who perfected the reorganization of said railway company at the instance and request of said Mason, Jilson, and White, this defendant, and all the parties interested; was made a director by the unanimous vote of all the stockholders of said company, and was the attorney for said railway company since its organization.

Defendant avers that there are now two parallel lines of railroad from Toledo to Columbus and to the coal-fields; that by the terms of the trust deed aforesaid all bonds issued for the extension of said road, being all of the bonds provided therein except the eight hundred thousand dollars originally issued, were to stand equally secured upon not only the extended line but the line already built; that it has been demonstrated that the business possible to a railroad company upon the line aforesaid is insufficient to make even two such parallel lines profitable or safe as an investment; that the Ohio Central Railroad Company, being the second line built in competition with the Columbus, Hocking Valley & Toledo, proved disastrous; that the same was unable to earn the interest upon its bonds, its mortgage was foreclosed and its property sold; that to build a third parallel line of railway would be a disasterous enterprise, in which, under the peculiar terms of the trust deed aforesaid, the security of the eight hundred and twenty-five thousand dollars already secured by the mortgage would be diluted and depreciated; that the price of the property is of sufficient value, and its income
and business under proper care and management can be made
83 such as to enable this defendant not only to pay the interest upon his indebtedness aforesaid, but to have a large margin in the property after such payment; but that to allow the extension of said road under the management and control of parties who have no interest in the present property and no monied investment to protect, but purely a matter of speculation, would be to destroy not only the value of the securities upon the completed line, but to entirely destroy all the equity which this defendant has in the property after paying his said indebtedness.

He alleges that said defendant railway company is now in good credit, with no floating indebtedness except its current monthly expenses, and is able to meet its regular operating expenses and make necessary and proper betterments of its said road-bed and property, and he denies all allegations in said bill of any improper management or any depreciation of its property, of any conspiracy with any other company or railroad for any purpose whatever, of any insolvency of said road or of this defendant, of any diversion of business, and, generally, of all improper conduct or unsafe condition of the property of said company.

He avers that to take the property out of the hands of the company and put it into the hands of a receiver would be to destroy its

credit, incur large and unnecessary expense and cost, permanently injure and destroy its property, and all to gratify a set of men who, having no interest in the property, sought to speculate upon it to their own profit and at the cost of its legitimate owners.

And this defendant denies all in said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for
84 this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove *and* this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) THEOPHILUS P. BROWN, *Defendant.*

THE STATE OF OHIO, } ss:
Lucas County, }

Theophilus P. Brown, being sworn, says he is the defendant above named, who has subscribed to the answer aforesaid; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except to thos- matters therein stated on information and belief, and as to thos- matters he believes them to be true.

(Signed) THEOPHILUS P. BROWN.

Sworn to before me and subscribed in my presence April 19th, 1886.

(Signed) F. W. RICKENBAUGH,
Notary Public, Lucas County, Ohio.

85 Supreme Court, City and County of New York.

THEOPHILUS P. BROWN, Plaintiff,
against
THE AMERICAN FINANCE COMPANY, ISRAEL B. MASON, Francello G. Jilson, John Doe, Richard Roe, The American Loan and Trust Company of New York, and The Toledo, Columbus and Southern Railway Company, Defendants. } Injunction Order, &c.

The plaintiff above named having applied to me, one of the justices of this court, for an order of injunction against defendants herein, and having upon such application presented to me an undertaking as prescribed by law, which said undertaking has been duly approved by me as to the form and amount thereof, and having presented to me the complaint in the action duly verified, together with the affidavits hereto annexed, and it appearing to me therefrom that plaintiff is entitled to the relief demanded in his complaint, and that unless the said defendants are enjoined and re-

strained during the pendency of the action as prayed for in the complaint herein the plaintiff will suffer irreparable damage and be deprived of the remedy to which he is justly entitled, and that the proceedings of the said defendants are unlawful, unjust, and oppressive and in fraud of the rights and interests of the plaintiff, and that sufficient grounds exist for this order:

Now, therefore, upon the summons and complaint and upon the affidavits aforesaid, and upon such amended or supplemental complaint and such further affidavits, depositions, and papers as may be served upon the said defendants or their attorneys not less than one day before the actual hearing to be had by the court upon this order, and upon motion of Burton N. Harrison, Esq., plaintiff's attorney, it is—

Ordered that the defendants show cause before one of the justices of this court, on the 1st day of March, 1886, at 11 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at a special term of the supreme court to be held in the first judicial district, at chambers of the court, in the county court-house, in the city of New York, on that day or on such adjourned day as the court may then and there prescribe, why the defendants and each of them, and the several officers, agents, employés, and attorneys of either of the defendants, should not be restrained and enjoined durduring the pendency of this action from further refusing to issue and deliver to the plaintiff his certain 7,993 shares of stock in the complaint mentioned of the Toledo, Columbus & Southern Railway Company, and share certificates therefor in the plaintiff's own name, and from further refusing to deliver to the plaintiff certificates for and representing his said shares duly endorsed for transfer, and from further refusing to deliver to the plaintiff sufficient powers of attorney, duly
86 executed, and authorizing the plaintiff as proxy of the person in the several certificates themselves named respectively to vote the said shares as the plaintiff shall think best at the annual meeting of the shareholders of said railway corporation to be held in March, 1886, and at any and every other meeting of such shareholders; and why the defendant The American Finance Company, the several officers, agents, and attorneys of said company, should not be restrained and enjoined during the pendency of the action from voting the said shares or any of them at any meeting of the shareholders of said railway corporation except as and when requested by the plaintiff, and particularly from voting such shares or any of them for the election of directors or members of the board of directors of said railway corporation unless such vote be for a majority of the members of said board of directors named and designated by the plaintiff himself, and why the defendant The American Finance Company, the several officers, agents, and attorneys of said company, should not be restrained and enjoined during the pendency of this action from assigning or transferring the said shares or any of them to any person other than the plaintiff, and from delivering the certificates for said shares

or any of them to any person other than the plaintiff, and from empowering or authorizing or permitting any person other than the plaintiff to vote the said shares or any of them, as attorney or proxy or otherwise; and why the defendants, the several officers, agents, and attorneys of either of the defendants, should not be restrained and enjoined during the pendency of the action from further refusing to surrender and deliver to the plaintiff the certain 800 bonds in the complaint mentioned of the Toledo, Columbus and Southern Railway Company the property of the plaintiff, and from using any of the said bonds, and from delivering any of them to any person other than the plaintiff himself, and why the defendants, the several officers, agents, and attorneys of either of the defendants, should not be restrained and enjoined during the pendency of the action from selling or negotiating or otherwise disposing of any other shares or bonds of the Toledo, Columbus and Southern Railway Company, and from issuing any such other shares or bonds; and why the defendants other than the American Loan & Trust Company, the several officers, agents, and attorneys of either of said defendants, should not be restrained and enjoined during the pendency of the action from further refusing to deposit with and leave in the custody of the American Loan and Trust Company any and all such other bonds and any and all certificates heretofore issued (if any such there are) for any such other shares; and why the defendant The American Loan and Trust Company, the several officers, agents, and attorneys of said company, should not be restrained and enjoined during the pendency of the action from certifying any more of said bonds of the Toledo, Columbus and Southern Railway Company, and from delivering or parting with any such bonds already certified (if any such there are) other than those which are the property of the plaintiff, and from delivering or parting with the latter to any person other than the plaintiff, and why the plaintiff should not have such other or further relief by order as to the court shall seem proper on the motion.

And it is further ordered that until the hearing and determination by the court of the motion upon this order to be made the defendants The American Finance Company, Israel B. Mason,
87 Francello G. Jillson, John Doe, and Richard Doe, the several officers, agents, and attorneys of either of said defendants, be and hereby are restrained and enjoined from selling or otherwise disposing of, assigning, or transferring or to any person other than the plaintiff delivering the said certain 800 first-mortgage bonds in the complaint mentioned of the Toledo, Columbus and Southern Railway Company or any of them, the property of the plaintiff, and from transferring or to any person other than the plaintiff delivering said certain 7,993 shares, in the complaint mentioned, of the stock of the said railway company or any of them or any certificate therefor or for any of them, the property of the plaintiff, and from voting or empowering or permitting any person other than the plaintiff to vote said shares or any of them except as the plaintiff shall hereafter direct.

And it is further ordered that service of this order before or on the 26th day of February, 1886, shall be sufficient.

Dated at chambers, New York, February 23, 1886.

(Signed) C. DONAHUE, *J. S. C.*

88 Article of agreement made and entered into on the 14th day of April, A. D. 1884, by and between Theophilus P. Brown, in the city of Toledo in the State of Ohio, party of the first part, and the American Finance Company, a corporation doing business in the city of New York, party of the second part, witnesseth:—

Whereas the said party of the first part is the owner of all the stock, except a nominal amount, and all of the first-mortgage bonds ($800,000) of the Toledo & Indianapolis Railway Company, which said bonds are now held in hypothecation by various persons and corporations to secure the payment of certain obligations of said railway company, or said party of the first part, and,

Whereas, the railway of said company, extending from the city of Toledo aforesaid to the city of Findlay in the State of Ohio, about forty-nine miles, is now in the hands of and is being operated by a receiver, and,

Whereas, there are sundry lien claims outstanding against said railway company and claims for right of way, labor and materials not secured by collateral, and,

Whereas, the said party of the first part is desirous of obtaining a loan or loans, as hereinafter mentioned, for the purpose of retiring said existing claims and obligations, and is desirous of making provision for the extension of said line of railway from Findlay aforesaid to the city of Columbus and to some point in the Hocking valley in the vicinity of Straitsville, in said State, and to Union City or other point on the C. C. C. & I. R. R., and in furtherance of said plans has applied to the party of the second part for its services, assistance and facilities in obtaining means with which to discharge said existing claims and obligations and to extend the line of said railway, as above mentioned, and said party of the second part has consented to render such services upon the terms and conditions hereinafter expressed:

Now, therefore, it is hereby agreed by and between the parties hereto, in consideration of the premises and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, as follows:

Article 1.

Said party of the first — agrees to sell and transfer the said stock and bonds and all the property and franchises of the said Toledo & Indianapolis Railway Company to a new company to be organized by said party of the second part, under the laws of the State of Ohio, upon the terms and conditions hereinafter expressed, and to cooperate with the said party of the second part in all proper ways in bringing about the consummation of the purposes of this agreement.

Article 2.

Said party of the second part agrees to proceed without unnecessary delay, upon the execution of this agreement, to organize the said new railroad company to be called "The Toledo, Columbus & Indianapolis Railway Company," and to the procuring of the engraving of the bonds and stock for the same, and of the settlement of the outstanding claims secured by the pledge of bonds aforesaid, and to the procuring of the loan of, say, $390,000 to $400,000, in
89 money, as may be deemed practicable, to be made upon the pledge of said outstanding bonds of said Toledo & Indianapolis Railway Company, or upon the bonds to a like amount of the proposed new railroad company as may be found convenient, the cash proceeds arising from such loan to be used in extending said Toledo and Indianapolis railway to a connection with the I. B. & W. R. R. at Findlay, and in taking up such of said claims as are liens prior to the mortgage made to secure said bonds, and to the settlement of all other claims, secured and unsecured, the payments on account of such settlements to be made in such manner as may be agreed upon between said party of the first part and the lender or lenders, and to be done in such way as to extinguish all the outstanding claims against said railway company and its property.

Such loans when made are to be secured by the promissory note of the said party of the first part, with said bonds at not more than fifty cents on the dollar as collateral security.

Article III.

As soon as practicable after the organization of said new railroad company, provision is to be made by it for the issue of its stock and bonds, the same to be used in the purchase of the stock, bonds, and property of said Toledo & Indianapolis Railway Company, and in the payment of said claims and obligations, and in extending said railroad as above mentioned and equipping the same, it being understood that the stock of said new railroad company shall be fixed at $25,000 per mile and the bonds at $20,000 per mile for each mile in length of railroad built and to be built and equipped, and that the bonds are to have forty years to run, bearing interest at six per cent. per annum, payable semi-annually, in New York, and to be secured by a first mortgage upon all the rights, property and franchises of such new corporation.

Article IV.

It is understood and agreed that the stock of said new railroad company to the amount of $25,000 per mile and its first-mortgage bonds to the amount of $20,000 per mile, or the net proceeds of said bonds, are to be paid for the stock, bonds and property of said Toledo & Indianapolis Railway Company, and that the remainder of the bonds and forty-five per cent. of the stock to be issued by said new railroad company are to be negotiated and the proceeds thereof are to be appropriated to the construction and equipment of

the remainder of the line from Findlay to Columbus and the Hocking Valley, and Union City or other point as aforesaid.

Article V.

Said party of the second part also agrees to undertake the negotiation of the entire issue of the bonds and forty-five per cent. of the stock of said new railroad company for the money, means and credit necessary to retire the securities of said Toledo and Indianapolis Railway Company, and to take up the secured and unsecured claims against the property of said last-mentioned railway company, and to extend the line of said railway from Findlay aforesaid to Columbus and Hocking Valley and Union City or other points aforesaid.

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Article VI.

There is to be allotted and paid to said party of the second part, in consideration of the premises, a commission or compensation of two and one-half per centum of the amount of money raised by said party of the second part for said party of the first part by way of loans or by means of the settlement of the claims and obligations, such commission or compensation to be payable at such time as the money received from such loan or loans shall be paid over to said party of the first part by said party of the second part, or as the existing obligations secured by the pledge of bonds as collateral shall be taken up, and as said liens and other claims shall be paid by said party of the second part, it being understood that the commissions mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about as the result of this agreement; but it is understood and agreed that if and so far as the loan of money shall be obtained, said party of the first part is to have the right of causing the purchase of such claims and liens upon such terms as he may be able to make with the holders thereof, and that whatever discount is saved in such purchase shall inure to the benefit of said party of the first part.

Article VII.

It is also understood and agreed that said party of the second part shall have the right to negotiate the sale of the said $800,000 of bonds of said Toledo & Indianapolis Railway Company in effecting the settlement of said claims, or for any other purpose which shall be approved by the said party of the first part, and is also to have the right to negotiate all the bonds and forty-per cent. of the stock to be issued by said new railroad company for any of the purposes expressed in this agreement; but none of said bonds issued by either company are to be negotiated, sold or otherwise disposed of at less than ninety cents on the dollar and accrued interest without the consent of said party of the first part.

Article VIII.

Said party of the second part is to have the right to negotiate a settlement with the parties in Chicago representing the rolling mill company and holding $401,000 of said bonds as collateral for a given sum of money due to said rolling mill company or its assigns, and to use therefor bonds and stock of said new railroad company at not less than the rates herein fixed.

Article IX.

Said party of the second part is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by said railroad company and negotiated; said ten per centum on said bonds being payable in said bonds at par, or in the net cash proceeds of the sale thereof, at its option, and on said stock in said stock at par; such payments or deliveries to be made from
91 time to time *pro rata* as any of such bonds shall be negotiated, sold or exchanged for outstanding liabilities or for property, labor and materials required by said railroad companies or either of them, or otherwise used or disposed of.

Article X.

In addition to ten per centum on stock hereinbefore agreed to be paid to said party of the second part as commission, there is to be appropriated and transferred to said party of the second part, as hereinbefore mentioned, in further consideration of the premises and its undertakings to secure the marketing of said bonds the forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered to said party of the second part *pro rata*, from time to time, as said bonds or any of them shall be negotiated or otherwise disposed of, as provided in the paragraph last above written; but the total of said ten per centum commission on stock and bonds shall not exceed ten per centum of the amount issued for each mile of road in the name of the new railroad company.

Article XI.

It is further agreed and understood that whenever the stock, bonds and property of said Toledo & Indianapolis Railway Company shall be turned over to said new railroad company, to be organized as above provided, the said party of the first part is to be thereupon elected president of said new railroad company and is to have forty-five per cent. of the stock of said new railroad company and the naming of a majority of the board of directors of said new railroad company, the minority thereof to be named by the party of the second part.

Article XII.

It is further agreed and understood that the work of making the connection between the present southern terminus of said Toledo

and Indianapolis railway in the city of Findlay aforesaid and said I. B. & W. R. R. is to be supervised and conducted by said party of the first part and is to be paid for out of the cash proceeds of the loan or loans herein first above referred to.

Article XIII.

It is also understood and agreed that the proceeding now pending in the United States court for the foreclosure of the mortgage given to secure said $800,000 of bonds of said Toledo and Indianapolis Railway Company, shall be prosecuted to completion, unless all the outstanding liabilities of said Toledo and Indianapolis Railway Company shall be paid and discharged and the road left free to its stockholders, to be turned over to said new railroad company in such a manner as to make the title of said new railroad company in said Toledo and Indianapolis property complete, free and clear. But said party of the first part is to use all proper means in his power to hasten or retard said foreclosure, as the said party of the second part may deem to be in the interest of its proposed negotiations, and when and if said sale shall take place under said foreclosure, said party of the second part shall have the right at its election to cause said property to be purchased by said new
92 railroad company at such foreclosure sale in accordance with the purpose of this agreement.

Article XIV.

It is hereby mutually agreed and understood by and between the parties hereto that if the loan is not obtained in time to pay off the present debts of the said Toledo and Indianapolis Railway Company (excepting the first-mortgage bonds) before said railway is sold at judicial sale, or the money provided with which to purchase the said railway at said judicial sale, and said railway shall not be so purchased by said party of the second part, as hereinbefore provided, that this contract shall be null and void, and no compensation or commission or expenses of any kind shall be claimed by the said party of the second part; and when said loan is obtained of sufficient amount to pay off said claims, or said railway shall be purchased at said judicial sale, as hereinbefore provided, it is agreed that unless said party of the second part shall raise money, means or credit necessary for the extension of said railroad to Columbus, Ohio, or other point to be agreed upon by the parties hereto, within one year from the date of procuring said loan, or from the date of the purchase of said railway, then and in that case this contract for negotiating the securities for said extension may, at the option of said party of the first part, become null and void.

Article XV.

The trust company which shall act as trustee of the mortgage securing the bonds of the new railway company shall be selected by the concurrence of the parties hereto and shall be from those now

located in the city of New York; and all bonds except those relating to the line from Findlay to Toledo shall remain in the custody of said trust company until drawn out by agreement of the parties hereto. Said party of the second part hereby agrees to advance for said new railroad company all expenses of organizing it and for engraving its bonds and stock; and is to have such engraving done in such manner as will make them eligible to be listed on the New York stock exchange. And it is also agreed that if said party of the first part procures the loan on the present bonds of the Toledo & Indianapolis Railway Company, no commission shall be claimed for the same by said party of the second part.

It is further agreed and understood that if said party of the second part shall find it necessary in conducting said negotiation to give or agree to give a majority of the stock of said new railroad company to the purchaser of said bonds, then and in that case a sufficient contribution is to be made by said party of the second part from its stock commissions herein provided for to make such majority. But in case the securities of said new company so to be organized by the said party of the second part, in pursuance of this agreement, shall be used in the purchase of the bonds, stock or property of said Toledo & Indianapolis Railway Company, and said extension shall not be made, then and in that case said party of the first part is to have a majority of said stock; and also that it is the intention of this agreement that if the proper amount of securities of said new railroad company shall in any manner be utilized or used in acquiring said Toledo & Indianapolis Company's se-
93 curities or property, said party of the second part is to *paid* its commissions as hereinbefore fixed.

In testimony whereof said party of the first part has hereunto subscribed his name, and said party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary on the day and year first above written.

(Signed) T. P. BROWN.
(Signed) AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*

[Seal American Finance Company.]

Attest: WM. P. WATSON, *Sec'y.*

94 Tripartite agreement made and entered into this 24th day of September, A. D. 1884, by and between Theophilus P. Brown, of the city of Toledo, in the State of Ohio, party of the first part; the American Finance Company, party of the second part; and Israel B. Mason of Providence, and Francello G. Jillson, of Woonsocket, in the State of Rhode Island, party of the third part, witnesseth:

That whereas an agreement was entered into, under the date of April 14th, 1884, by and between said parties of the first and second parts (copies of which are held by each of the parties thereto) in relation among other things, to the negotiation undertaken by said

party of the second part for said party of the first part, of the notes of the said party of the first part to the amount of $325,000 and also to the negotiation of $800,000 of the stock and $800,000 of the first-mortgage bonds of said Toledo and Indianapolis Railway Co., and said party of the second part has requested said parties of the third part to take said notes on behalf of themselves and associates, and said parties of the third part have consented thereto, upon and subject to the terms and conditions herein expressed, and subject to the consummation of all the details to the satisfaction of all the parties hereto;

It is therefore hereby agreed by and between the parties hereto that said terms and conditions are and shall be as follows:

1. Said Brown is to make, endorse and deliver his several promissory notes, in approved form and denominations, payable to his own order within two years from this date, with interest at six per cent. per annum from date, said interest to be payable semi-annually, and said notes to be accompanied by first-mortgage bonds of said Toledo and Indianapolis Railway Co., at the rate of fifty cents on the dollar, as collateral security, said bonds bearing coupons maturing April 1st, 1885, all past-due coupons and those maturing October 1, 1884, being first taken off and cancelled.

2. The net proceeds of said loan are to be applied to the purchase and taking up of the present outstanding claims against the T. & I. Railway Co., and its property, secured and unsecured, (including the purchase by said Brown of the interest of Patrick Dowling contractor, in said railway) and to the payment of the expenses incident thereto; and also to the building of an extension of said railway from its present southern terminus to a connection with the Indiana, Bloomington and Western and the Lake Erie and Western railroads at Findlay, O. And also to the payment of the balance due on rolling stock heretofore purchased by said Toledo and Indianapolis Railway Company.

3. All the outstanding claims so purchased and taken up as aforesaid by the use of the proceeds of said loan are to be, so far as practicable, assigned in blank or to said American Finance Company in trust as may be found advisable, and are to be delivered to said American Finance Co. to be held by it in trust as follows:

When all the claims not secured by said first-mortgage bonds as collateral shall have been purchased and taken up the same are to be forthwith cancelled; but this stipulation shall not prevent the cancellation at any time of any portion of said claims not
95 secured by bonds as collateral whenever said first and third parties may agree to such cancellation, and all claims secured by bonds as collateral which shall be so purchased and taken up are to be assigned and delivered to said American Finance Co., in trust, for the common use, benefit and protection of all holders of said first-mortgage bonds. And when said loan shall be paid, or sooner if the parties hereto shall agree, said claims so secured are to be cancelled.

4. If any of the proceeds of said loan shall remain after the pur-

chase and delivery of said claims as above provided, such residue shall then be paid over to said Brown.

5. All the $800,000 full-paid stock of said Toledo & Indianapolis Railway Co., (except a nominal amount thereof held by the directors for qualification,) is also to be issued and deposited with said American Finance Co., and is to be disposed of as follows: Upon the payment of said loan, or in case of default of such payment, there is to be issued and delivered by said trustee to said parties of the third part, $360,000 of stock; to said Brown $408,000 thereof and to said American Finance Co. $32,000 thereof the same to be issued in the names of said parties respectively.

6. A bonus of ten per cent. on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of such purchase, in first-mortgage bonds of said Toledo & Indianapolis Railway Co., at par.

7. Upon the purchase, assignment and delivery of the claims secured by the pledge of first-mortgage bonds, such action shall be taken in relation to the receivership, taking judgment on such claims, or the entering of a decree of foreclosure, or the dismissal of the suit of the Union Trust Co. of New York, trustee, now pending, as the parties hereto may deem best, it being understood that upon the request of the holders of said notes, said Brown, acting as the president of said Toledo and Indianapolis Railway Co., is to forward or retard all legal proceedings now pending or such as may be hereafter commenced, as the holders of said notes may deem advisable.

8. The net proceeds of said notes are to be deposited in such bank or trust Co. as the said Mason and Jillson, and said American Finance Co. may designate, such deposit to be made for the credit and account of said "American Finance Co., trustee," in trust, for disbursement by it for the purposes hereinabove expressed.

9. All the remainder of said $800,000 of first-mortgage bonds of said Toledo and Indianapolis Railway Co. over and above the $650,000 of the same pledged to secure the payment of said $325,000 of said notes are hereby appropriated as follows: To the purchasers of said notes their bonus, amounting to $65,000 thereof to be distributed among them *pro rata* according to their respective holdings of said notes. 2. To said American Finance Co. $80,000 thereof in full payment of all its claims for commissions for negotiating said $800,000 of said bonds. 3. To said Brown $5,000 thereof, such appropriations and the delivery of said bonds to be made from time to time, *pro rata*, as said notes are disposed of.

96 10. It is also further agreed and understood that when the proposed new railroad company, contemplated and provided for in said agreement between said first and second parties hereinabove referred to, shall have been organized and shall issue its bonds and stock for the purchase of the bonds and stock of said Toledo and Indianapolis Railway Co. to a like amount now outstanding, and for extending said railway to Columbus, O., and said purchase shall be consummated, said Brown is to receive all the excess of bonds and stock so to be issued in payment for said T. &

I. railway, which shall be issued by said new railroad company at the rate of $20,000 per mile of each (bonds and stock) for all the road which shall be in operation from the tracks of the I. B. & W. and the L. E. & W. railroads at Findlay, O., to Toledo, O., after providing for said outstanding stock and bonds of said T. & I. railway Co., it being understood that the road now in operation is about forty miles in length and that when said connection or extension at Findlay is completed there will be over forty-one miles in length, upon which bonds and stock of the new railroad Co., are to be issued at the rate of $20,000 per mile of each.

11. In consideration of the personal services of said Mason and Jillson in the examination of said Toledo and Indianapolis railway, and of the responsibility assumed by them as endorsers, and in bringing their associates into the loan, it is agreed that when the $365,000 of bonds pledged as collateral as aforesaid are sold, and said loan is paid, and said Brown is entitled to receive the excess over and above the payment of said loan, said Mason and Jillson are to receive $50,000 of said bonds or the proceeds of the sale thereof, to their own personal use.

12. It is agreed that until said loan is paid all the net earnings of said Toledo and Indianapolis Railway Company from the time of its completion to a connection with the I. B. & W. and said L. E. and W. railroads are to be applied as follows:

1. To the payment of the interest on said notes. 2. To the payment of the interest on said remaining $150,000 of bonds; and 3. To the payment of interest on said $650,000 of said bonds.

But it is also agreed and understood that in case such net earnings, when so applied, shall not be sufficient to pay such interest and coupons from the date of the making of the connection with said railroad last above named, to the maturity of said loan, that no default is to be taken or declared on said coupons maturing prior to the maturity of said loan and no proceedings at law shall be taken against said Toledo & Indianapolis Railway Company to enforce the payment of the same; but this provision shall not be construed to prevent such proceedings from being commenced and prosecuted at any time subsequent to the maturity of said loan, nor to abate to any extent, the amount of interest and coupons so to be paid.

In testimony whereof the several parties hereto have subscribed this agreement on the day and year first above written.

(Signed.) T. P. BROWN.
AMERICAN FINANCE COMPANY,
By J. C. SHORT, *Pt.*
I. B. MASON.
FRANCELLO G. JILLSON.

97 Afterwards, to wit, on the 21st day of April, A. D. 1886, there was filed in the clerk's office of said court the following replication, to wit:

Replication to Brown's Answer.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN. } In Equity.

The replication of the American Loan and Trust Company to the answer of said Theophilus P. Brown.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said Theophilus P. Brown, for replication thereunto saith that repliant doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in law, and that said answer is very uncertain, evasive, and insufficient in law to be replied unto by the repliant without that; that any other matter or thing in the said answer contained material or effectual in law to be replied unto, and therein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

S. W. BOWMAN,
R. A. HARRISON,
Solicitors for Complainant.

98 Afterwards, to wit, on the 22d day of April, A. D. 1886, there was filed in the clerk's office of *each* court the following answer, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN. } Answer.

Answer of The Toledo, Columbus and Southern Railway Company, one of the defendants, to the bill of complaint of The American Loan and Trust Company, complainant.

This defendant, now and at all times hereafter saving and reserving unto *him*self all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill, for answer thereto,

or unto so much or such parts thereof as this defendant is advised is or are material or necessary for *him* to make answer unto, saith that the following allegations and averments and denials in the separate answer of Theophilus P. Brown it hereby adopts as its own and makes its answer herein the same as if specially averred and denied by it: That "he" admits that the complainant is a body corporate under the laws of New York and a citizen of said State; that the defendant The Toledo, Columbus and Southern Railway Company is a body corporate under the laws of Ohio and owner of a line of railroad from Toledo to Findlay, and engaged in operating the same as alleged, and that this answering defendant is a citizen resident of the State of Ohio.

99 He denies that the Toledo, Columbus and Southern Railway Company was incorporated with an authorized capital stock of five million dollars to build and operate a railroad from Toledo through the city of Columbus to the village of Belpre, on the Ohio river, or that in payment for the purchase of that part of the completed road from Toledo to Findlay it issued its bonds to Francello C. Jillson for the sum of eight hundred thousand dollars as alleged, but on the contrary says that said bonds were issued and a mortgage to secure the same executed in accordance with and only for the purpose hereinafter stated.

He admits the execution of the mortgage or deed of trust named in the complainant's bill of complaint. He denies that in pursuance of the terms of said deed of trust the said complainant has certified and delivered unto the said railway company one thousand of the bonds provided for in said deed of trust, of one thousand dollars each, but says that if any more than eight hundred and twenty-five of said bonds were thus certified it was in violation of the resolutions and provisions made therefor by the stockholders and board of directors of said defendant company and without any warrant or authority, and that if nine hundred and fourteen of said bonds had been negotiated and are outstanding (which he denies) the same was for any excess over eight hundred and twenty-five of said bonds done fraudulently and without any warrant or authority from said railway company and for the purpose of furthering the ends and purposes and the fraudulent design and scheme of Francis A. White, the American Finance Company, and the other parties combining and confederating with them as hereinafter specifically alleged. He admits that eight hundred of said bonds were issued in the

100 place of and to take up the eight hundred thousand dollars of bonds and the mortgage to secure the same first issued to said Francello G. Jillson, and that said last-mentioned mortgage has been cancelled of record.

He denies that in pursuance of the certificate of incorporation and the certificate for the extension of said line of railway and for any purpose whatever said railway company has caused this line of railway to be surveyed and located from said city of Findlay to a junction with the track of the Pennsylvania Railroad Company about 18 miles from the city of Columbus, or that he has contracted with any owner of land through which said line

as alleged has been located for the right of way for any part of said extended line, or that any contracts have been procured by said company at great expense, or that any such contracts are valuable, whether paid for or not, or that any rights of way have been procured by the company, and defendant alleges that if any such contracts have been made or any such proceedings or steps taken it was done without the knowledge of the board of directors of said company and in violation of a resolution passed by the board of directors that no contract for the extension of said railroad or procuring the right of way should be binding upon the company until first submitted to and approved by said board of directors.

He denies that if said railroad is built to said junction any permanent or advantageous arrangement can be made by it with the Pennsylvania Company for the use of its track into the city of Columbus, or that any parties stand ready to purchase any securities of said defendant railroad company to enable it to extend said line of railroad to the said city of Columbus, or that they would do so but for the acts of said Brown or the others as charged in said bill of complaint.

101 He admits that he has since the organization of said railway company been a member of said board of directors; that he has been the general manager of said railway and in charge thereof as such, but he denies that he procured himself to be elected a director and general manager, or that he procured contracts for a future interest therein by reason of any of the representations in said bill of complaint mentioned, or by representing that he was in favor of and would labor to promote the extension of said road; but, on the contrary, alleges that his interest in said railway is shown by the contracts under which the same was purchased at the judicial sale and the reorganization thereof affected, which contracts are hereinafter more specifically set forth.

He denies that he entered into any secret combination with the Columbus, Hocking Valley and Toledo Railway Company and the Toledo and Ohio Central Railway Company, parallel and competing lines, or with persons largely interested therein to defeat the extension of the said railroad, or that on the 25th of March, 1886, the day of the annual election of the directors for the defendant railway company, the said defendant secretly and fraudulently, either by himself or in connection with any of the others named in said bill, procured the order of injunction therein alleged. He admits that he did file a petition in the court of common pleas of Lucas county setting up his interest in the stock of said railroad and the fraudulent combination to deprive him of the advantages which said stock legally gave him, and which, under the contracts hereinbefore and hereinafter referred to, he was lawfully entitled to, and alleging that

102 he had commenced an action in the supreme court of the city of New York against the American "Financial" Company, Francis A. White, Israel B. Mason, Francello G. Jillson, and others seeking to obtain from them his lawful rights in the premises which they had denied him, and that in said action and upon due notice the American Finance Company and its officers and

agents and all the other defendants to said action were restrained until the further order of court from voting upon said stock in said order described, a copy of which order is attached hereto and made a part hereof, and that said Francis A. White, who was the vice-president of said American Finance Company, has caused himself to be elected president of the defendant railway company in violation of the contracts aforesaid and the rights of said Brown as a holder of a large majority of the stock of said railroad, intended to violate said injunction, expected to be at the annual meeting aforesaid, and intended fraudulently and without lawful authority to vote said stock for the purpose of ousting said Brown from participation in the management and control of said railroad, in which he was more largely interested than all others combined.

He admits that at the said annual election for directors he caused, by voting upon stock which he was lawfully the owner of and entitled to vote upon, the election of Alexander W. Scott as a director in place of Samuel R. Follett, who had previously been a director of said company, but he (elected) that the said Samuel R. Follett was never qualified or eligible as a director of said company; that he was a non-resident of the State of Ohio and a citizen of the State of New York, and that, Mason and Jillson being also non-residents of Ohio, the board was made up, in violation of law, of a majority of its directors non-residents of said State of Ohio; that in
103 addition thereto it was provided by the contracts aforesaid that the said defendant, Brown, should have the right to name a majority of the said board of directors, and that he should himself be elected the president of said company; that, in violation of said contracts and his rights as the holder of a majority of said stock, the said American Finance Company, as hereinafter alleged, having fraudulently caused said stock to be issued in its own name because the said Francis A. White was the president of said railroad company and his son, C. E. White, was the secretary of said company, having possession of the stock books and ledgers of said company, elected the said board of directors and the general officers of said company as constituted for the year preceding the last annual election; and he denies that by reason of said election or of any combination, secret or otherwise, the defendant or the board of directors thus elected wrongfully and unlawfully has assumed control of said railway company for the purpose of defeating the extension of said line of railway or for any other purpose than the lawful management and control of the said company's affairs.

The defendant is unable to state whether the allegation of said bill as to the persons in whose names the stock stands upon the books of said company is true or not, for the reason that, in violation of the laws of the State of Ohio and against the repeated protests of this defendant, the books of the company, including its records, certificate of incorporation, and of the general records of the company, have been by the said Francis A. White and C. E. White taken from the general offices of the company, kept in the city of New York or elsewhere, and without the power of defendant to obtain access to them, but he avers that if any stock stands in the

name of W. C. Lemmert, James M. Brown, Henry E. Lee,
104 Frank A. Lee, C. F. Watts, George P. Kirby, M. C. Fogarty, W. G. Alexander, Judd Richardson, James S. Robinson, J. G. Chamberlain, E. M. Brown, S. S. Teals, Charles Hutchinson, or Harvey Scribner, that the same were issued to said parties fraudulently, without authority from the board of directors, without subscription being made thereto or any authority to receive any subscription therefor, and because and for the purpose of the fraudulent combination hereinafter alleged, entered into by said parties with the said American Finance Company, Mason, Jilson, and White for the purpose of ousting said Brown and the lawful officers of said company from the management and control of said company's affairs, and for the purpose of evading and violating and ignoring the injunction granted in said cause in New York and pending the same.

The defendant further says that he denies that Israel B. Mason and Francello G. Jillson furnished all the money actually invested in the property of said railway company or any part thereof, or that they have now or ever have had an investment in said railway company of any money or thing whatever. He denies that the stock was so transferred to the American Finance Company, trustee, for the benefit and protection of said Mason and Jillson so as to secure the extension of said railroad as aforesaid, but he alleges that, as is hereinafter more specifically set forth, every dollar of the money used in the purchase, repair, and equipment of said railroad was the money of this defendant; that he borrowed the said money from the said Mason and Jillson, as shown by the contracts hereafter, and executed his promissory notes therefor, which are now held by said Israel B. Mason, and secured the said notes by the transfer of the bonds of said railroad company
105 as provided in said contract; that said notes have not yet matured; that the semi-annual payment of interest thereon has been promptly paid at a much greater rate, too, than they called for by the same; that no default has been made in any of said notes or any payment due thereon, and that it was provided in the contract under which said loan was made that so long as this defendant paid the interest on said notes no action should be commenced on any of the bonds of said company because of any default in payment of the interest on such bonds.

Defendant admits that if it were not for the injunction aforesaid, granted by the court of common pleas in Lucas county, a board of directors other than elected would have been elected, made up of parties who have no interest in said railroad, but who would be the paid agents of the said American Finance Company and said Francis A. White for the purpose of speculating in the scheme or project of pretending to build a third parallel railroad from Toledo to Columbus, which would have been at all times a disastrous and unfortunate speculation for those interested in the present property of the defendant railway company and would have had no other effect than to dilute and depreciate the securities and property of the already constructed railroad.

Defendant denies that the election of the directors at the annual

election is null or void or that under the management of the board of directors thus elected the property of the railway company or its business is liable to suffer.

He denies that he has been engaged or is now engaged in diverting the legitimate business of the defendant company to the lines of the other competing roads so as to prevent it from paying
106 its operating expenses and the interest on its bonds issued under the complainant's deed of trust, but he avers on the contrary that under his management the business of said defendant railway has constantly increased and is still increasing; that instead of diverting business to competing roads they are complaining that he is by all manner of devices obtaining business which legitimately belongs to them, and that he is obtaining business wherever he can legitimately do so for said defendant railway company, so that he is making the said road a success in its earnings beyond the expectation of any parties interested in it.

He denies that he is allowing and suffering the road-bed to become out of repair or that the rails are becoming bent or impaired; but, on the contrary, avers that said road-bed never was in as good condition as it is now; that he has been constantly repairing it, putting it in as perfect order as possible, which repairs are still being continued to be made, and the road-bed is still constantly improved.

He denies that he has been engaged in selling any ties from along the line of the road so as to deprive the company of ability to keep its line in repair, or that he will do so unless a receiver is appointed.

He denies that the Ohio Central Terminal Railway Company owns valuable terminal railway facilities at Toledo, but says that he has no knowledge as to who is the actual owner of said terminal facilities; that a suit has been commenced in the court of common pleas of Lucas county against said terminal railway company for the purpose of restraining it from asserting any claim or ownership to said property and quieting the title of plaintiff in said action, The Toledo & Ohio Central Railway Company. He admits that
107 a lease was made by said terminal railway company to the defendant railway company for said terminal facilities, but he avers that the defendant's lessor was not in possession and has not been able to put the defendant railway company in possession of said railway property, and has no line of railroad connecting with said property or over which access to said property can be obtained; that the only means of getting to said property or to any terminal facilities afforded to defendant railway company or possible to it is over a line of track belonging to the Toledo & Ohio Central Railway Company; that said last-named company is in possession of said terminal property; that the use of the same is absolutely necessary to any business by the defendant company, and that a conflict with the said Toledo & Ohio Central Railway Company would result in a switch being turned against this company and it prevented from reaching any depot or other place within the city of Toledo for the purpose of receiving or discharging freight or pas-

sengers; that notice was served upon said terminal company by resolution of the board of directors that until the possession of said property should be given to the defendant company, The Ohio Central Railway Company in the meantime insisting upon rental, to wit, for the use of its track and for the privileges aforesaid, it would be improper and impossible for the defendant railway company to pay the rent under said lease; but that notwithstanding the fact that the lessor was unable to put the said lessee in possession of said property, the said Francis A. White, without authority of the board of directors, continues to pay to the terminal company rent under such lease up to and including the last month due thereunder; that inasmuch as the said terminal company has been unable to put the said lessee in possession of the leased property, and inasmuch as said lease has but a few months to run,
108 and it is optional with either party to renew the same or not, and the Ohio Central Railway Company, who is in possession of said terminal property and who owns the only railroad connecting it with the line of defendant's railroad and who has the power to exclude the defendant company from the use of such track, is making no threat or effort to exclude the defendant company from the use of all of said property so long as it complies with the contract with said Ohio Central Railway Company made prior to said lease, the danger of forfeiting the said lease is purely imaginary, and no harm can arise to the said company from anything in connection with said lease.

Defendant denies that unless a receiver is appointed the said line of railway will become deteriorated in value; that its earnings will not pay its operating expenses; that the security of complainant's beneficiaries will be impaired or possession of said terminal facilities lost, any right of way belonging to said railway company forfeited, the rails injured or unfitted for use, the business of said company diverted, or the trust of complainant fail or be in anywise impaired.

The defendant says it is true that no interest has been paid on the bonds of said railway; but he says that no person is interested in said bonds except this defendant and said Mason and Jilson, and except that the American Finance Company claims to be the owner of one of the notes of this defendant to said Mason for the sum of $10,000, and is thereby interested in the security of the bonds that were pledged to secure said notes; that the only persons who have any interest whatever as beneficiaries under such deed of trust are this defendant, Mason, and the American Finance Company, the last named being limited to the said ten-thousand-
109 dollar note; that all of said parties were parties to the tripartite agreement hereinafter mentioned and hereto attached; that by the terms of said agreement no action was to be commenced for any default of the interest upon said bonds during the life of said notes executed by this defendant to the said Mason and Jilson if the interest was paid on said notes; that the first installment of interest on said notes matured in March, 1885, and was paid; the next installment matured in September, 1885, and was paid; the third installment maturing in March, 1886, on the ten-thousand-dollar note

held by the American Finance Company was paid, and by the terms of said notes the interest was payable at the office of complainant, in New York city; that on the day of maturity of said interest the said defendant, by his agents in New York, tendered at the office of complainant the interest on all the said promissory notes, the aggregate of said notes being three hundred and fifteen thousand dollars; that the complainant refused to receive the same, saying that the notes were not there, and that prior thereto and immediately thereafter this defendant, through his agents in New York, the Central Trust Company, and also personally, telegraphed to Mason and Jilson that the interest was ready and would be paid whenever the notes were presented, either at the office of complainant or of the Central Trust Company of New York, and the money is now there for the purpose of paying the interest due on said notes in March, 1886, if it has not already been received by the holders of said notes.

That therefore defendant says that there being no other beneficiaries under said trust deed than those who were parties to said contract that no action can be maintained by said trustee, the complainant, upon said trust deed by reason of any failure to pay
110 the interest aforesaid. The defendant, therefore, denies that the bonds were negotiated with the coupons thereon, or that any of said coupons remain unpaid in fact, or that anything whatever is due or payable to the holders of any of said bonds. He denies that the railroad company is insolvent. He denies that twenty-seven thousand four hundred and twenty dollars or any other sum is due on said coupons, or that default thereon has continued for more than thirty days, or that any owners or persons interested in said bonds have requested the complainant to enter and take possession of said railroad or to enforce said mortgage, or that they have any right to do so. He denies that the complainant, in pursuance of said request, has demanded from the president of said company the possession of said property. He avers that he is the president of said company and that no such demand has been made. He denies that the mortgage security is insufficient to pay the indebtedness of said company, or that if it is any person will suffer thereby except this defendant. He avers that the only amount due to any person except this defendant by reason of said bonds is the sum of three hundred and twenty-five thousand dollars claimed to be due to said Mason and Jilson, but which this defendant denies; that the question as to whether anything is due to the said Mason and Jilson or any person else upon said promissory notes by virtue of the various matters alleged by this defendant is now involved in an action pending in the city of New York, wherein this defendant is complainant, against the said American Finance Company, the American Loan & Trust Company, Francello A. White, and said Mason and Jilson; that if any amount is found due to the said Mason and Jilson in said action or in any other action the security held by them is ample and more than ample to completely
111 protect the same, and out of which the said parties can obtain full and complete satisfaction of said notes; and this defendant is ready at all times, upon the maturity of said notes, to pay the

same in full if it shall be determined that anything is due thereon and the full amount of whatever is determined to be due from defendant.

The defendant denies that there is embarrassed condition of the railway company's financial affairs, but avers that the company is amply able to pay its current expenses and much more; that it has no indebtedness; that no person has a right to demand from the company any interest upon the coupons on said bonds until the maturity of the notes aforesaid, and that when that event happens the defendant expects to and is able to make arrangements for the full payment thereof; that there are no legal difficulties connected with said property that are not the result of the combination and conspiracy hereinafter mentioned to destroy the value of said property and its securities for the personal gain of those who have no financial interest in said railroad.

He denies that there is any difficulty in the trustee executing said trust without the aid of the court, or that there is any necessity for the appointment of a receiver in this case.

The defendant avers that during the pendency of the proceedings to foreclose the mortgage executed by the Toledo & Indianapolis Railway Company in this court, which railway company was the owner of the said line of railway from Toledo to Findlay, this defendant, being largely interested in said railway company and its property, negotiated a loan from Mason and Jilson through the agency of the American Finance Company for the sum of three hundred
112 and twenty-five thousand dollars for the purpose of buying the claims against said railway company secured by its mortgage and for the purpose of enabling this defendant to buy said property and to protect his interest therein; that the contracts between this defendant and the American Finance Company and between this defendant and the American Finance Company and said Mason and Jilson are hereto attached and made a part hereof; that by the terms of said contracts it was provided—

1. That the money should be used by the American Finance Company for the purpose of buying up said claims; that the property should be purchased and that the bonds of the old company, or, if a reorganization took place, of a new company, to the amount of six hundred and fifty thousand dollars should be pledged to the repayment of said three hundred and twenty-five thousand dollars; that this defendant executed his promissory notes for said three hundred and twenty-five thousand dollars, payable in two years from date, the said notes being dated September 24, 1884, with semi-annual interest; that the money thus obtained by this defendant upon his promissory notes and the security aforesaid was the money of this defendant and was the money used for the purpose of buying and equipping said railroad.

2. That it was provided that the stock of the said railroad should be issued, whether of the old company or of the reorganized company, so as to give this defendant a majority of said stock; that he was to have the right to name four directors of said company and to be himself elected president thereof.

That in pursuance of said contract the road was purchased at the judicial sale aforesaid and the money paid for the same, and also all the money for the purpose of making repairs and pur-
113 chasing necessary equipment was the money thus borrowed by said Brown; that it was provided also in said contract that the said American Finance Company should negotiate certain bonds to be provided for the extension of said railroad company, provided they did so within one year from the date of said contract, and if they did not do so within that time, then Brown was to have the right to terminate that part of the agreement providing for such extension; that the American Finance Company wholly failed to make any negotiation for said bonds providing for said extension or to provide any money therefor within the time named, and said Brown in writing notified them of the termination of the contract in that respect after the expiration of the time therein provided; that said American Finance Company never had and has not now a dollar of money invested in said railway company or its property; that after the reorganization of said company and for the purposes of its temporary organization by the election of officers Francis A. White was elected its president; that a board of directors was elected consisting of the present board, excepting said A. W. Scott, and Samuel R. Follett; that after the organization was perfected this defendant insisted and demanded that the terms of said contract should be complied with in respect to the election of a board of directors, four of whom should be named by him, and that he should be elected the president thereof, but the American Finance Company, Francis A. White, its vice-president, said Mason and Jilson, who are stockholders and directors in said American Finance Co., conspiring together to defraud this defendant and to eventually squeeze him out of the said corporation and of his interest therein, caused the son of said Francis A. White to be elected the secretary of said company, removed all the books, records, and papers of the company from
114 its general offices at Toledo to the city of New York, and thereupon caused the stock of said company, except one share to each of the directors, to be issued in the name of the American Finance Company, trustee, thereby giving to said White, Mason, and Jilson the entire voting power of the corporation; that defendant repeatedly in writing protested against this action and demanded, both in writing and verbally and personally and through his attorney, that the said contract should be carried out and the stock issued as provided, but the said parties refused; that prior to the annual election for the year 1886 the defendant, fearing that the stock aforesaid thus issued in the name of persons having no interest therein and for the fraudulent purpose, as defendant believes, of voting him out of the company and defrauding him of his interest therein, personally and by attorney, in the city of New York, demanded of Israel B. Mason and the American Finance Company that the stock should be issued as provided in said contract, and that the certificates thereof should then be left with the American Finance Company, as provided in said contract and as security, but that the same was refused; that thereupon this de-

fendant commenced his action in the supreme court of the city of New York, as hereinbefore alleged; that afterwards and just before the said annual election, defendant being informed that said White and said finance company intended to disregard the injunction aforesaid and the said White coming to Toledo on the night before the annual election, the defendant commenced his action aforesaid in the court of common pleas to restrain the said White and his confederates from voting said stock; that in addition to the stock mentioned in said contract it was provided

115 that this defendant should make and extend the line of road from its terminus in Findlay to the railroad of the Indiana, Bloomington & Western Railway Company, for which he was to receive twenty thousand dollars a mile in the bonds of the company and twenty-five thousand dollars a mile in the stock of said company; that said extension was made by this defendant, and thereupon there was issued to him the bonds of the company in the sum of twenty-five thousand dollars and the stock of the company in the sum of thirty-two thousand five hundred dollars, which stock stood in his name upon the books of said company; that thereupon at the annual election the said Brown, for the purpose of carrying out in good faith his said contract aforesaid, voted all of his stock in favor of a board of directors consisting of the said Francis A. White, Israel B. Mason, and Francello G. Jilson, the other four being named by this defendant, consisting of the same persons as the former board except the said Samuel R. Follett, and naming said Scott in his place; that said Samuel R. Follet had several months before the election gone back to the city of New York, where he has continued to remain, and that he never was in the State of Ohio to the knowledge of this defendant except when he was sent here by the said Francis A. White at the time of his election as a director, and remained at Findlay under a salary from the company during a part of the year during which he was a director; that the salary was paid him for the purpose of enabling him to remain in Ohio ostensibly in the employ of the company, but really for the fraudulent and unlawful purpose of keeping a non-resident in the board of directors, while the balance of the board was equally divided between citizens of Ohio and citizens of other States.

The defendant says that the American Finance Company, through its officers and agents, devised the scheme of the extension

116 of said line of railroad for the purpose of floating its bonds upon the market and receiving the commission and the profit that might result from such a speculation; that a resolution of the board of directors was introduced authorizing the president of the defendant company, the said White, who was also vice-president of the finance company, to make contracts for the extension of said road, but that the board of directors refused to pass such a resolution except with the provision that no such contract should be binding upon the company unless it first received the approval of the board of directors; that no contract was ever submitted to the board of directors or was ever approved by it for the extension of said road or for

the acquiring of any right of way or the incurring of any liabilities therefor; that when the said defendant exercised the option given him by said contract of terminating the contract with the finance company for such extension the said finance company and said White and his son, C. E. White, the secretary of the defendant company, with other persons conspiring and confederating with them, conceived the fraudulent design and purpose of ousting said defendant from the said railroad company, and for that purpose and without consideration or lawful authority caused the stock to be issued to the persons hereinabove named, who were either the attorneys of said White and said finance company or of persons interested in said scheme or so engaged with the said White and the finance company in the fraudulent design aforesaid, and was so fraudulently issued for the purpose of enabling the parties aforesaid to vote at the annual election for the said part-, and said stock was so fraudulently issued as aforesaid to oust the legitimate owners of the stock and parties interested therein from the control
117 and management of the company; that the stock books have been kept out of the office of the company and in the private possession and control of said White and the said finance company, together with all the other records aforesaid, although the law requires that all the books of the company be kept in the office of the company, which is to be located on its line of railroad, and although its general office was by resolution located and established at Toledo, where it now is; that if no notice was given by the secretary of the annual meeting of stockholders for the election of directors it was omitted at the instance and request of said Francis A. White and by an arrangement between him and his said son, C. E. White, secretary of said company, for the purpose of aiding the said parties in the said conspiracy, but that it was not intended to regard the want of such notice as material by the said White and his associates, is shown by the fact, as alleged in said bill of complaint, that were it not for the injunction aforesaid a board would have been elected at said meeting in the interest of said parties and by the fact of the fraudulent issue of stock to the attorneys of said parties and their associates so as to enable them to become directors of said corporation, although having no interest whatever in it or its property.

The defendant admits that one of the directors aforesaid is the attorney for the Toledo & Ohio Central Railway Company, but he avers that John H. Doyle, who is charged to be the attorney for the Columbus, Hocking Valley & Toledo, was a director of said company long before the times alleged in said bill of complaint; was the attorney who perfected the reorganization of said railway company at the instance and request of said Mason, Jilson,
118 White, this defendant, and all the parties interested; was made a director by the unanimous vote of all the stockholders of said company, and was the attorney for said railway company since its organization.

Defendant avers that there are now two parallel lines of railroad from Toledo to Columbus and to the coal-fields; that by the terms of the trust deed aforesaid all bonds issued for the extension of said

road, being all of the bonds provided therein except the eight hundred thousand dollars originally issued, were to stand equally secured upon not only the extended line but the line already built; that it has been demonstrated that the business possible to a railroad company upon the line aforesaid is insufficient to make even two such parallel lines profitable or safe as an investment; that the Ohio Central Railroad Company, being the second line built in competition with the Columbus, Hocking Valley & Toledo, proved disastrous; that the same was unable to earn the interest upon its bonds, its mortgage was foreclosed and its property sold; that to build a third parallel line of railway would be a disasterous enterprise, in which, under the peculiar terms of the trust deed aforesaid, the security of the eight hundred and twenty-five thousand dollars already secured by the mortgage would be diluted and depreciated; that the price of the property is of sufficient value, and its income and business under proper care and management can be made such as to enable this defendant not only to pay the interest upon his indebtedness aforesaid, but to have a large margin in the property after such payment; but that to allow the extension of said road under the management and control of parties who have no interest in the present property and no monied investment to protect, but purely as a matter of speculation, would be to
119 destroy not only the value of the securities upon the completed line, but to entirely destroy all the equity which this defendant has in the property after paying his said indebtedness.

The said Toledo, Columbus and Southern Railway Company further avers that it is now doing a fair and legitimate business, more than enough to pay its operating and necessary expenses; that it is in charge of the duly authorized board of directors and officers, who are giving it their personal attention and devoting their time and energies to its success; that to take the management of its said property out of the hands and control of this defendant would be disastrous to its best interests and prejudicial to its property, the people doing business with it, and its property; that the effort to force the extension of its road at this time with no money with which to do it, no possibility of the sale of its bonds, and its affairs entrusted to those instigating this suit, who have no interest other than the possibility of speculating on the contingency of such sale in the future, would be to destroy its credit, which is now good, depreciate its property, put it into antagonism with established and powerful corporations, and eventually require its sale at judicial sale under foreclosure proceedings and wipe out and destroy the property of the stockholders of said company.

That this company now has no floating indebtedness; that it is able to pay its current expenses monthly and has done so ever since its organization and no necessity whatever exists for a receiver or in any manner interfering with its business.

That in the above answer wherever the language thereof refers to the defendant — adopts the same as applicable to this defend-
120 ant in the denials and allegations therein contained. It denies all al legations of said bill of complaint that it is insolv-

ent; that its property is being deterioriated; that its business is being diverted; that its officers are engaged in any conspiracy or arrangement of any kind except to manage it for its best interests. It denies that any of its bondholders are entitled to maintain any action for interest on its bonds, and beyond its corporation and that of the plaintiff and the issue of the bonds and mortgage or trust deed therein referred to it denies every allegation of said bill of complaint not expressly admitted; and this defendant denies all in said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Wherefore it prays that said bill of complaint may be dismissed; that the application for receiver and injunction be denied, and that it may be hence discharged and recover its costs.

THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY CO.,
THEOPHILUS P. BROWN, *President.*

JOHN H. DOYLE,
General Counsel and Solicitor for Def't.

THE STATE OF OHIO, } ss:
Lucas County, }

Theophilus P. Brown, being duly sworn, does depose and
121 say that he is the president and general manager of the above-named answering defendant; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to the matters thus stated he verily believes them to be true.

THEOPHILUS P. BROWN.

Sworn to before me and subscribed in my presence April 19, 1886.

F. W. RICKENBAUGH,
Notary Public, Lucas County, Ohio. [SEAL.]

122 Afterwards, to wit, on the 31*th* day of May, A. D. 1886, there was filed in the clerk's office of said court the following replication, to wit:

Replication to Answer of Toledo, Columbus and Southern Railway Co.

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.* } Replication.

The replication of The American Loan and Trust Company, plaintiff, to the separate answer of The Toledo, Columbus and Southern Railway Company, defendant.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of exceptions which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall
123 direct, and humbly prays as in and by its said bill it has already prayed.

S. A. BOWMAN,
R. A. HARRISON,
Complainant's Solicitors.

124 Afterwards, to wit, on the 11th day of January, A. D. 1887, there was filed in the clerk's office of said court the following opinion of Judge Hammond's, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, — Toledo.

DECEMBER 6, 1886.

THE AMERICAN LOAN & TRUST CO.
versus
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO. *et al.*

HAMMOND, *J.*:

The impressions made at the argument that this case does not present a state of facts justifying the appointment of a receiver have not been removed by a more careful consideration of the subject upon the elaborate printed briefs which have been filed. Undoubtedly there are cases where a court of equity may take hold of mort-

gaged property before default in the condition of the mortgage and protect the security against impending dangers from fraudulent management, but this is not one of them. It would be intolerable to extend that principle so as to transfer to a court of equity every controversy over the management of mortgaged property or to convert those courts into the supervisors of the control of every corporation where property is pledged to secure its mortgage debts. Take the feature of this case dependent on the question whether it be wise to construct that extension of the railroad which was in contemplation of the parties to this mortgage and the other contracts connected with it as a simple example. That involves a matter of discretion in the judicious management of the property which properly belongs to the directors in charge of the company, and it is not the function of a court of equity to direct the exercise of that discretion upon any judgment of the court that the extension should or should not be made. The court, as to that, may be no wiser than the directors and the complainants no wiser than either.

If loss occurs to the mortgagees from unwise action in that
125 regard it is one of the inevitable results of the mismanagement of property by its owners, and the remedy is not, certainly, to be found in usurpations of control by the court through a receiver or otherwise.

But it is said the management is influenced improperly by the persuasive manipulations of a rival enterprise. This is a suspicion of bad faith that may be well or ill founded, but we do not see why a court of equity should, even if it be true, assume to determine either that the extension should or should not be made through the process of appointing a receiver and undertaking the control of the property. This is an extension of the uses of courts beyond any reasonable limits and a dangerous application of their power. Under that doctrine the whole business of building railroads might be readily committed to the courts of equity, and, in the end, perhaps, be more disastrously managed.

But, if it be conceded that a court of equity should interfere for relief in such cases, it seems to us that the proper remedy would be by a bill either to rescind the contract for the fraudulent breach of it or else to compel its specific performance, if that were possible.

This bill as originally constructed did not pray for any such relief or make any other appeal to the equitable considerations that govern the rights of the plaintiff in relation to its contracts with the defendants. It simply asked for the appointment of a receiver who should manage the property and pay the mortgage debt according to the terms of the contract. It did not ask us to complete the extension or to execute the other stipulations of the contract or to compel the defendant company to do so, nor did it ask to rescind

it nor yet to sell the road and foreclose the mortgage. It
126 seemed to proceed on the theory that it is the right of dissatisfied creditors to have a receiver whenever the management of the property does not suit them. We do not understand the law to be so. Whatever may be the powers of a court of equity to construct railroads or to manage them through a receiver, in

form at least, those powers must be exercised as an adjunct to the jurisdiction of enforcing some of the well-understood equitable rights of the parties in relation to their contracts. There is no such branch of equitable jurisprudence as the appointment of railroad receivers for the management of the property upon any and every disagreement of those interested as to the proper conduct of the business.

It is not wonderful that creditors imagine that they are entitled to such relief nor that disappointed speculators suppose there is such a method of mitigating their losses or correcting their mistakes of contract, considering the strides that have been made in using the courts for such schemes; but the use must fall within some one of the departments of equitable jurisprudence to entitle us to entertain it, whatever we may do after we get hold of it.

On this suggestion of a defect in the bill the prayer was amended and it now assumes the form of a bill to foreclose a mortgage upon default of payment of interest. Now, in this form, we cannot and should not proceed to rescind the contract or to reform it or to specifically execute it or to substitute one board of directors for another or to give guidance to the existing directors or to transfer the management of the property to others who would like to be in charge, or, indeed, to do anything concerning it, appointing a receiver in the meantime, which the plaintiff would like to have done with it.

We can only look at the suit as a bill to foreclose a mortgage
127 and nothing else, whatever the facts might on a bill filed for some other purpose justify. The difficulty of maintaining any other relief than a bill to rescind the contracts for the alleged frauds is manifest in reading the allegations of the bill and the contracts of the parties. As a bill to foreclose a mortgage the circumstance appears that, substantially, that is not really the ground of complaint, but dissatisfaction with the management of the road, disappointment in not being able to control the directory, or, further back, a realization that the contract may not be as wide as it was supposed to have been nor as carefully guarded to secure the interests of plaintiff as, perhaps, it might have been; but it is plain that a court of equity will not, on such grounds as those, take control of the property and manage it through a receiver. If plaintiff has been overreached by fraud, possibly a bill to cancel the transaction would lie; possibly a bill to control the action of the company's directory if there be any ground for that, but certainly not a bill to foreclose a mortgage not broken in its conditions when the bill was filed; and, as to occurrences since, there have been filed affidavits and counter-affidavits concerning the non-payment of Brown's notes in New York; but they do not alter the situation, since, if anything can be asked because of these occurrences, they must be pleaded by amended or supplemental bill.

This requirement of the case relieves us largely of the necessity of considering the force of the allegations of the bill in respect of any other relief than that which is asked and confines us to those which are material to the subject of a foreclosure of the mortgage and the determination of the dispute whether, as a fact, there has

been such a breach of its conditions as entitles the plaintiff to a foreclosure; but before going to that we may say that, while we
128 have conceded the general proposition that a court of equity will sometimes interfere by injunction to prevent a waste or destruction of the mortgaged property before the conditions of the instrument have been broken and a right to foreclose accrued, it does not thereby result that the court will appoint a receiver to manage the property until the mortgage can be foreclosed. That would come to the management by the court of all mortgaged property where there was deterioration or fear of it. But in this case it is sufficient to say that aside from disagreements as to the best mode of managing the property there is no substantial waste of it, the controversy about the cross-ties, like the others, being a mere suggestion as to the better management of the affairs of the company, and at most too insignificant in its character to be applicable in support of this motion for a receiver. All this character of allegations in the bill amount to protests against the management of the company under its present control and are such as a critical business judgment might make against the management of almost any railroad enterprise—a mere conflict of opinions as to business operations.

We come now to the question whether there has been a breach of the conditions of the mortgage so that the plaintiff is entitled to foreclose it. It cannot be denied that the interest due upon the coupons has been in default, and strictly according to the terms of the mortgage there has been a breach of its conditions. But there are other facts connected with this which, if they do not excuse that breach and amount to an extension of payment of the coupons, certainly furnish abundant reason for a refusal by a court of equity to appoint a receiver pending the dispute whether the plaintiffs are entitled to a foreclosure because of it. Indeed the very existence of a reasonable dispute as to whether the conditions of the mortgage have been broken are sufficient to cause the court to refuse
129 a receiver, for one ought not, ordinarily, to be appointed unless the right of foreclosure is clear and indisputable, and this upon the general grounds that one lawfully and by the contract of parties in possession of the property should not be disturbed in that possession except in a clear case of a right to do that. These railroad mortgages provide for this, as does that in this case, by enabling the bondholders to take possession upon default, through a trustee, and while this is only cumulative to the remedy in equity the existence of that provision in itself furnishes the main ground for the appointment of a receiver by the court on a bill to foreclose, for otherwise it is not an absolute right to dispossess the company pending a bill to foreclose. It is generally done because this and other stipulations of the mortgage, together with the fact that default itself evidences bad management and the necessity for a change of possession, justify it; but still the appointment of a receiver is not a matter of course in all cases upon a default and a bill to foreclose, nor if it appear that the company may excuse the default or the plaintiff be estopped by contract or otherwise from relying on it. There other considerations come into play and the court should gen-

erally not disturb the possession until the right of foreclosure has been established at the hearing. It is, therefore, not only unnecessary but improper that on this motion, upon proof by affidavits and counter-affidavits only, we should undertake to construe these contracts and say now that the plaintiffs are entitled to a foreclosure, and by consequence of that to a receiver preliminary to a decree of sale and foreclosure. It is sufficient here to say that by reason of the stipulations of the tripartite and other agreements it may be fairly claimed by defendants that no default has taken place by mere failure to pay the coupons, but that under the stipula-
130 tions the right of payment has been extended by the plaintiff. The plaintiff denies this construction and says that the contracts, taken all together, do not mean that, but we think the case presents a reasonable controversy over that point, and until it is settled we should not appoint a receiver, particularly since the plaintiff may renew the motion at any time if subsequently occurring facts have made it justifiable to do so, and the order overruling the motion will reserve to plaintiff the right to renew it.

We come to this conclusion the more readily because we can see from the frame-work of this bill the absence originally of any prayer to foreclose the course of the argument and the whole case that plaintiff was driven to assume a right to foreclose as the best possible ground upon which to predicate the demand for a receiver, the real objection being dissatisfaction with its contract, as subsequent events developed its weakness, and an endeavor to escape the consequences of a misadventure in getting control of the enterprise. Railroad mortgages are sometimes used as an instrumentality of adventurous speculation rather than a safe security for money advanced, and while the courts should use every possible endeavor to save to the utmost the value of the security, when properly called on to do so, they should not suffer themselves to become likewise an instrumentality of adventurous speculators seeking to use them as weapons of offense in the warfare that goes on among themselves. They should confine themselves strictly to the domain of courts of law and equity, engaged only in the business of settling according to the established rules of law and equity the controversies that arise and come within the workshop of jurisprudence, but not those that lie outside and within the arena of gladiatorial struggles for business advantages and speculations.

The plaintiff here does not like, and perhaps is alarmed,
131 possibly not without cause, at the conduct of their joint enterprise by the defendants, but that dislike and alarm do not furnish any solid basis of interference by a court to appoint a receiver to quiet that alarm. We cannot look only to the mortgage and shut our eyes to the other contracts and transactions between the parties from which it appears that they were joint adventurers in an enterprise of which this mortgage contains only a part of the agreement and stipulations. Looking at them all, we do not find that the plaintiff is certainly now entitled to foreclose the mortgage and to a receiver pending that foreclosure.

Motion denied.

Welker, J., concurs.

132 Afterwards, to wit, on the 26th day of January, A. D. 1887, there was duly entered on the journal of said court the following order, to wit:

Leave for American Finance Co. and O. C. Terminal R'y Co. to be Made Parties Defendant, etc.

At a circuit court of the United States held in and for the northern district of Ohio, western division, the 26th day of February, 1887, at the Federal court-house, city of Toledo.

Present: The Honorable Martin Welker, judge.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN. } In Equity.

The American Finance Company having presented its petition to the court to be allowed to intervene in this action to protect its interests as a holder of certain first-mortgage bonds secured or alleged to be secured by the mortgage referred to in the bill of complaint herein, and it appearing from said petition that there is reason to believe that the interests of said petitioners, The American Finance Company, may be better protected by such intervention, and such petition having been filed by leave of the court, now, on motion of Mr. Fowler, solicitor for the said petitioner, it is order- that the said American Finance Company, also the Ohio Central Terminal Railway Company, be, and are hereby, made parties defendant, with leave to file a cross-bill and to take such proceedings in the cause as by *its* counsel advised.

Enter above order.

133 Afterwards, to wit, on the 3rd day of February, A. D. 1887, there was filed in the clerk's office of said court the following supplemental bill, to wit:

Supplemental Bill.

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN, Defendants.

To the honorable judges of the said circuit court:

The complainant, The American Loan and Trust Company, a body corporate as in its original bill herein filed alleged, having first obtained leave of the court herein to file this its supplemental bill, avers and says that since the filing of its said original bill herein and since the filing of the several answers and replications,

to wit, on the 27th day of September, 1885, the said several notes of the said Theophilus P. Brown in his answer set forth, as well as in the answer of the defendant corporation, became due and payable by their terms and by the terms of the several agreements in said answer set forth, and the same were not paid and still remain unpaid; and the complainant further avers that thereafter, the said notes still being unpaid, and the said coupons on said bonds in complainant's original bill alleged to be past due all remaining unpaid, and the said defendant railway company still continu-
134 ing in default of payment of said interest coupons or any of them, to wit, on the first day of July, 1886, there matured on said bonds the coupons thereon representing the interest due thereon on said first day of July, 1886, all of which remain unpaid, and no money or means were provided for their payment or deposited with said complainant for the payment of the same or any of them, and complainant avers that the default in the payment of said interest coupons has existed for more than three months and for more than six months since the maturity thereof, and that complainant has been requested by the holders of the majority of said bonds to commence and maintain this action for the foreclosure of said mortgage.

And complainant here reavers and reiterates all of the allegations of its said original bill so far as the same relates to the execution, power to execute, and the delivery of the bonds and mortgage and the property covered by the same and the conditions thereof and the default thereon and its right to foreclose the same and have the property sold; that this complainant of its knowledge does not know what amount of bonds have been legally issued by defendant company, and it leaves the holders of said bonds to make proof of their rights thereunder as they may be advised and as this court by its decree may direct, and it prays that at the proper time that question and all questions as to the actual amount due on said bonds and to whom due may be determined by this court.

That the amount of the coupons maturing in July equals three per cent. upon the amount of bonds legally issued, which is at least twenty-four thousand seven hundred and fifty dollars, and
135 the same amount matured also January 1, 1887, and complainant refers specifically herein and hereby to the provisions of said mortgage, a true copy of which is attached to said complainant's original bill, for the provisions thereof authorizing the foreclosure and sale of said property, and especially to the provision thereof that if default be made in the payment of the interest moneys mentioned in said bonds or the coupons attached thereto or any of them, or in payment of any part thereof according to the tenor and effect of such bonds or coupons, and such default shall continue for a period of six months, at the option of the holders of one-quarter of the bonds outstanding hereunder the whole principal moneys mentioned in and secured by the whole of said bonds which shall be or become outstanding hereunder, together with interest thereon, shall become and be considered as

forthwith due and payable, although the period limited in such bonds for the payment thereof shall not then have expired.

And complainant avers that the holders of more than one-half of said bonds outstanding and more than six hundred of the same have elected to treat said bonds as due, and exercised the said option thus provided for in said mortgage and bonds and so notified this complainant; and complainant therefore avers that in addition to the interest coupons aforesaid there is now due and payable the entire principal and matured interest of the said bonds legally issued by said defendant company, amounting to over the sum of eight hundred and fifty thousand dollars.

And your orator therefore prays that it may have the decree of this honorable court foreclosing the mortgage aforesaid and ordering the sale of said property by a master commissioner of
136 this court upon such notice as the court may require and under such regulations as may be usual and equitable in such cases, and for full equitable relief in the premises which at any time the court may find and determine it to be entitled.

BLAIR & RUDD,
Complainant's Solicitors.

E. D. POTTER, JR., *Of Counsel.*

We hereby enter our appearance to the above supplemental and amended bill, and waive the issuing and service of any subpœna or other process or notice thereof or of the filing or contents thereof.

THE COLUMBUS, TOLEDO & SOUTHERN RAILWAY COMPANY AND THEOPHILUS P. BROWN,
By J. H. DOYLE, *Att'y for Above-Named Defendants.*

137 Afterwards, to wit, on the 9th day of April, A. D. 1887, there was duly entered on the chancery order book of said court the following order, to wit:

Order Appointing Receiver.

In the Circuit Court of United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Plaintiff,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Proceedings for Equitable Relief and Foreclosure of Mortgage.

This day came the intervening petitioners, Stevenson Burke and Charles Hickox, and also the defendants, The Toledo, Columbus & Southern Railway Company and Theophilus P. Brown, by their solicitors, and made their application to the court for the appointment of a receiver for the said Toledo, Columbus & Southern Railway, its property and effects, upon the grounds set forth in their

intervening petition and in the original and supplemental petition and answers and other pleadings filed in this case.

Upon consideration whereof, the court being fully advised in the premises, it is ordered that James M. Ferris, of Toledo, Ohio, be, and he is hereby, appointed a receiver of said The Toledo, Columbus & Southern railway, with all its property and effects, including its railway from Toledo, Ohio, to Findlay, Ohio, with all its tracks, rights of way, terminal facilities, stations, rolling stock, equipment supplies, moneys, accounts, bills receivable, and all other its
138 personal and real property of every name, kind, and nature wherever situated. The said receiver is hereby authorized to exercise all the powers, rights, and authority conferred by the statutes of Ohio upon receivers and such as are usual in proceedings instituted in courts of equity.

And it appearing to the court that the said line of railway is being operated, and that it would be prejudicial to the interests of the creditors of said railway company and to the public to suspend the operation thereof, the said receiver is hereby authorized to run and operate said railway, and for that purpose to employ all such help and aid as he may find necessary to run and operate said railway economically and prudently in the interest of all parties interested in said property.

The said receiver is hereby authorized and directed to take immediate possession of said railway and all its property and effects of every name and nature wherever situated; to collect all moneys that may be due to said railway company; to make payments of all bills, accounts, and expenses legitimately incurred in the running and operation of said railroad during his receivership; to keep said railroad and its rolling stock in good order and repair so that it can be safely and properly employed in the transportation of passengers and freight

The said receiver is also hereby directed to pay the wages of all laborers and other employees of said railway company which are now due or owing upon account of labor or services performed during the past 60 days.

He is also hereby directed to make payment for any supplies purchased for said railway and remaining unpaid within the last 60 days, and he is also directed to make payment upon any car or locomotive trust as payments may fall due until further order of the court. The said receiver is not, however, to make any pay-
139 ments except from the income of said property or from moneys which he may collect upon its account and for its benefit until the further order of the court.

The court reserves to itself the right to make any other and further order in regard to the payment of the floating or current indebtedness of said railway company and to make any other order in respect to the rights or interests of any party which the court may at any time deem proper to make.

It is further ordered that before entering upon the duties of his office as such receiver that the said James M. Ferris give bonds for the faithful discharge of his duties as such receiver and for compli-

ance upon his part with all orders of the court to be made in said action or any other action and for the payment, as directed by the court, of all such moneys as may come into his hands and for the faithful performance of his duties as receiver in all other respects in the sum of $30,000, to the approval of the court or judge.

Approved April 9th, 1887, and the clerk of U. S. circuit court will enter same.

HOWELL E. JACKSON,
Circuit Judge.

140 Afterwards, to wit, on the 9th day of April, A. D. 1887, there was filed in the clerk's office of said court the following intervening petition, to wit:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY, Plaintiff, *vs.* THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants. } Intervening Petition of S. Burke *et al.*

Now comes Stevenson Burke and Charles Hickox, and, by leave of the court first obtained, filed this their intervening petition herein. They say that they are the owners of a large majority of the bonds of said railroad company secured by the mortgage mentioned in plaintiff's bill, to wit, over $700,000 thereof; that the complainant, the trustee, is a corporation organized and doing business as a trust company under the laws of the State of New York; that one Roland N. Hazzard is the president and executive officer of said company, having the direction and control of its business, and as such has assumed the direction and control of this suit.

That your petitioners are also the owners of a very large majority of the stock of said company; that said Roland N. Hazzard, the president of the complainant as aforesaid, has given out and pretends that he, in his individual right, is the owner of the majority of the stock of said company, pretending to have purchased the same from some persons to your petitioners unknown on the 21st of March, 1887, since the commencement of the action and during its pendency.

That on the day of the annual election for the election of directors of the defendant railway company, to wit, on the
141 24th of March, 1887, at about two o'clock, the time for opening the polls of said election, the said Roland N. Hazzard filed in the court of common pleas, Lucas county, Ohio, a petition alleging that he was such owner and made thereto as defendants all of the directors of said company and persons in whose name the stock of said company stands or should stand on the books of said company under the direction of your petitioners, defendants, and prayed for and obtained an injunction restraining the said defendant railway company from their receiving votes of any persons of-

fering to vote on said stock or in fact other than the plaintiff, and also restraining the directors of said company from voting any of the stock thereof, and served said injunction upon all the persons present at the annual meeting of said company except two single shareholders after said meeting had organized for the transaction of its business.

That the personal interest of the said Roland N. Hazzard and the attitude which he has assumed towards the defendant railway company pending the litigation now going on in this cause for the foreclosure of the mortgage securing the bonds of your petitioners renders the said American Loan & Trust Company incompetent and incapable of faithfully and impartially administering the trust conferred upon it by the execution of the mortgage aforesaid, and renders it and its said officer hostile to the real owners and beneficiaries of the bonds secured by the mortgage which it is seeking to foreclose. They further aver that the said Hazzard has retarded the progress of the litigation in his personal interest; that the contracts set out in the answer of the defendant railway company and

142 Theophilus P. Brown, heretofore filed herein and to which reference is hereby made, provided for the issue *of* the said defendant railway company and said defendant Brown — $408,000 of the stock of said defendant railway company, and to the parties named in the said contract, Israel B. Mason, Francello G. Jillson, of $360,000 of said stock.

That, as alleged in the answer heretofore filed, the American Finance Company, through its vice-president, F. A. White, who was elected president of the defendant railway company, and his son, whom he caused to be elected the secretary thereof, in violation of said agreement, issued the said stock in the name of the American Finance Company as trustee; that these petitioners, having purchased all of the interest of said Brown and also all of the interest of said Mason and Jillson, became the owner of the said stock as well as of the bonds of the said company, and demanded that said stock be assigned by said trustee to them; that said Hazzard, said White, and Short, the president of the said finance company, having been acting together and in collusion for the purpose of preventing a foreclosure of said mortgage and of obtaining the possession of said property; that a number of suits have been commenced in the State courts and in this court, instigated, as your petitioners are informed and believe, by the said American Finance Company and its officers, for the purpose of complicating the administration of the said property and the foreclosure of the said mortgage; that the suit of the said Hazzard and the injunction obtained thereon preventing the lawful election of a board of directors of the said company is for

the purpose and will result in further complicating the difficulties growing out of the controversies between the claim-

143 ants to said stock and calculated to seriously affect the property and its value as a security to your petitioners for the bonds held by them and of all of their said stock in said railway company; that other suits are threatened in the State courts by said parties for the purpose of taking said property out of the jurisdiction of this

court and administering it in the interest of the said parties who are in fact not owners of the same or any part thereof.

That unless this court assumes the entire control and management of the said property until its final decree herein it will become seriously impaired as the security and expensive and vexatious lawsuits will result; that a number of parties have intervened in this action, setting up various claims as to the bonds and property and upon the liens to the same; that suit has also been commenced ostensibly for the purpose of setting aside the sale heretofore made by this court of the property or part of it in the controversy herein in a former action of the Union Trust Company against the Toledo & Indianapolis Railway Company and other actions commenced in the State courts for the purpose of establishing liens upon the said property or claims thereto, instigated, as your petitioners are informed and believe, by the same persons who have been acting with the finance company and the said Hazzard in embarrassing, delaying, and attempting to defeat the rights of your petitioners to their bonds and the security therefor.

Your petitioners file herewith a copy of the petition of the said Roland N. Hazzard filed in the said court of Lucas county upon
144 which the injunction of the aforesaid was obtained, and prays that this court shall remove the said trustee from further connection with or administration of the trust aforesaid and appoint some disinterested and suitable person or trustee to act in his place, to whom shall be transferred all of the powers, rights, and privileges conferred upon the said American Loan & Trust Company by trust, deed, or mortgage in its said bill of complaint fully set forth and described, and also that this court shall appoint a receiver of the property aforesaid to hold and manage for the benefit of all the parties interested during the pendency of this suit, and for such further relief as they may be entitled —, and especially that the title to their bonds secured by the said mortgage may be fully established and maintained and that they may have a decree enforcing the same and protecting them in their rights.

BURKE, INGERSOLL & SANDERS &
J. H. DOYLE, *Sol's for Comp't.*

STATE OF OHIO, }
Lucas County, } *ss:*

Stevenson Burke, being duly sworn, says that he has read the foregoing petition and knows the contents thereof; that those matters therein alleged as upon information and belief affiant believes to be true and all other matters therein alleged are true.

STEVENSON BURKE.

Subscribed in my presence and sworn to before me by Stevenson Burke April 7th, 1887.

[SEAL.]

ALBERT STRAUS,
Notary Public.

We enter our appearance to the above intervening petition and waive any further order or notice of the object or prayer thereof or of the application to the court for the relief therein sought for the appointment of a receiver or otherwise this 25th day of March, 1887.

THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY CO.,
By JNO. H. DOYLE, *General Counsel.*

T. P. BROWN.

145 EXHIBIT "A."

In the Court of Common Pleas of Lucas County, Ohio.

ROWLAND N. HAZZARD
vs.
THEOPHILUS P. BROWN, WILLIAM T. WALKER, ALEXANDER W. SCOTT, JOHN H. DOYLE, F. A. WHITE, I. B. MASON, F. G. JILLSON, and THE TOLEDO, COLUMBUS and SOUTHERN RAILWAY CO. } Petition.

Now comes the said Rowland N. Hazzard, plaintiff, and for his petition against the said Theophilus P. Brown, William T. Walker, Alexander W. Scott, John H. Doyle, F. A. White, I. B. Mason, F. G. Jillson, and The Toledo, Columbus & Southern Railway Company, defendants, says as follows:

That the said Toledo, Columbus & Southern Railway Company is a corporation organized under the laws of the State of Ohio, having its principal office in the city of Toledo, in the county of Lucas, and owns and operates a railroad between the said city of Toledo and the city of Findlay, in the county of Hancock, in said State. The plaintiff says that the capital stock of said railway company is of the par value of $825,000, divided into 8,250 shares of $100 each; that the total number of shares of said capital stock issued is 8,250 shares, and that the plaintiff is the legal owner and holder of two hundred and twenty-five of said shares and the equitable owner of all the rest and residue of said shares issued, and as
146 such owner is entitled to vote at any stockholders' meeting of said company on all said shares; and the plaintiff says that the said defendant, Theophilus P. Brown, is the president of said railway company, and as such in the full possession of the property thereof and of all its facilities for business, including its main offices in said city of Toledo; that the said William T. Walker is the vice-president of said railway company, and the said Alexander W. Scott the secretary thereof, and the said Theophilus P. Brown, John H. Doyle, William T. Walker, Alexander W. Scott, F. A. White, I. B. Mason, and F. G. Jillson directors of said company.

That said individual defendants have no proprietary interest whatever in said company, its property, franchises, or effects, and are not the owners either in law or in equity of a single share of said company's capital stock.

And the plaintiff says that by the by-laws of said railway company the annual stockholders' meeting for the election of the board of directors is fixed for this 24th day of March, 1887, at 2 o'clock p. m., at the said office of said company, in said city of Toledo, and that the plaintiff is informed and charges the fact to be that the said individual defendants, Brown, Walker, Scott, Doyle, White, Mason, and Jillson, have, with the fraudulent purpose of wrongfully seizing upon the franchises and property of said company in disregard and violation of the rights of the plaintiff, conspired and are conspiring to take full charge of said annual meeting of stockholders which is to be held at the time mentioned and in pursuance of said provision of the by-laws and to cause the rights of the plaintiff to be entirely disregarded and subverted, and to cause a spurious board of directors to be placed in full possession of the business,
147 property, and effects of said railway company, and in order to accomplish their said unlawful purpose the said individual defendants, as the plaintiff is informed and charges the fact to be, threaten and propose to disallow and to refuse to count the votes which may be presented by the plaintiff at said meeting, and instead of such votes which may be presented by the plaintiff said defendants propose to have represented in their behalf or in behalf of said Brown shares of said capital stock to which neither himself nor any of said individual defendants have any equitable or legal claim or title.

And the plaintiff further says that he acquired his said proprietary interest and ownership in the stock of said railroad company subsequently to the commencement of a suit by the said Brown against the American Finance Company and others in said court and subsequently removed to the United States circuit court for the northern district of Ohio and subsequently to the commencement of any suit in the supreme court of the city, county, and State of New York, in which said Brown was a party, and subsequent to the making of any order therein.

And the plaintiff avers that if the said individual defendants shall carry out their unlawful purpose as hereinbefore set forth of preventing and defeating the plaintiff in the exercise of his just and lawful rights as the owner and holder of the entire capital stock of said railway company, the same will result in the great and irreparable injury to said defendant company and in great and irreparable injury to this plaintiff.

148 And the plaintiff further says that he acquired his said ownership of the said capital stock on the 21st day of March, 1887, in the city of New York, and at the time of such acquisition he had no knowledge of the time fixed for the annual meeting of the stockholders for the election of directors, and for this reason there has not been sufficient time for notice to the defendants of this application.

Wherefore, by reason of the premises, the plaintiff asks that each and all of the said individual defendants be enjoined by the order of this court from voting or empowering or permitting any person other than the plaintiff to vote any of said shares of capital stock

at said annual election and meeting of stockholders of said railway company or any adjourned meeting thereof, and that said defendant The Toledo, Columbus & Southern Railway Company and its several officers, agents, and directors be enjoined by the order of this court from receiving, counting, or otherwise recognizing the votes of any other persons or parties than this plaintiff or persons empowered by him at the said annual meeting and election or at any adjourned meeting of the same and for such other relief as is necessary, and that a preliminary injunction be granted pending this action to the same effect and force.

JOHN COON,
Pl'ff's Att'y.

I. P. PUGSLEY, *Of Counsel.*

149 STATE OF OHIO, } ss:
Lucas County, }

Rowland N. Hazzard, plaintiff, being duly sworn, says that all the allegations contained in the foregoing petition are true.

R. N. HAZZARD.

Sworn to before me and subscribed in my presence this 24th day of March, A. D. 1887.

JAMES H. EMERY,
[SEAL.] *Notary Public in and for Lucas County, Ohio.*

A preliminary injunction is allowed as prayed for in the foregoing petition upon plaintiffs giving a bond in the sum of two thousand dollars, to the approval of the clerk of this court, to be in force until the further order of the court herein.

LOUIS H. PIKE, *Judge.*

Toledo, March 24th, 1887.

In the Court of Common Pleas of Lucas County, Ohio.

150 Afterwards, to wit, on the 9th day of April, A. D. 1887, there was filed in the clerk's office of said court the following answer, to wit:

Answer to Supplemental Bill.

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN, Defendants.

Now come the defendants, and insisting upon the denials, averments, and allegations of their said former answers herein filed—that not more than $25 of the bonds of said defendant railway company were ever lawfully or legally or by the defendant company or by

its authority issued or delivered to any one or legally outstanding, and all matters in said answers to allegations in said bill other than those referred to or reiterated in said supplemental bill—admit that said 825 bonds are outstanding; that the notes mentioned in the said answers have since the filing of the original bill and answers matured, and that the holders of more than a majority of said bonds have elected to treat the said bonds as matured because of a default in the payment of said coupons for more than six months, and admit the allegations and averments in said supplemental bill contained; and they pray the court that the amount of said bonds and the ownership thereof may be adjudged, determined, and ascertained herein before final decree of distribution or final dis-
151 position of this cause, but consent to the decree of sale as prayed for.

THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY,
By T. P. BROWN, *President.*
THEOPHILUS P. BROWN.

JOHN H. DOYLE, *Counsel.*

152 Afterwards, to wit, on the 18th day of May, A. D. 1887, there was filed in the clerk's office of said court the following consent, to wit:

Consent Extending Time of American Finance Company to Answer.

U. S. Circuit Court, Northern District of Ohio, Western Division.

AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO. *et al.*

It is hereby consented that the time of the added defendant, The American Finance Company, to answer the supplemental bill of complaint herein be extended to June 1st, 1887.

THE AM. LOAN & TRUST CO.,
By E. D. POTTER, JR., *Its Att'y.*

May 12, 1887.

153 Afterwards, to wit, on the 30th day of May, A. D. 1887, there was filed in the clerk's office of said court the following answer, to wit:

Answer of Defendant American Finance Company to Cross-Bill of Burke et al.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division. In Equity.

The separate answer of the defendant American Finance Company to the cross-bill of Stevenson Burke and Charles Hickox, styled by them an intervening petition.

This defendant, American Finance Company, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said cross-bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for the defendant to make answer thereto, answering, saith:

Save as herein appears, it is not the fact that the said Stevenson Burke and Charles Hickox are the owners of a large majority of the bonds of said The Toledo, Columbus and Southern Railway Company, to wit, over $700,000.00 thereof; that the facts are that on the 10th day of December, 1885, one Theophilus P. Brown claimed to have certain rights and corresponding obligations in respect of the bonds and stock of the Toledo, Columbus & Southern Railway Company under and by virtue of the several agreements hereinafter mentioned and copies of both of which are hereunto attached and made a part hereof as Exhibits "A" and "B" respectively.

154 That on the said tenth day of December, 1885, the said Stevenson Burke and Charles Hickox were both directors and managing officers of the Columbus, Hocking Valley & Toledo Railway Company, a corporation under the laws of Ohio.

That said Burke and Hickox, as directors and officers aforesaid, on the said 10th day of December, 1885, were instrumental in making a certain other agreement in writing by and between the said Columbus, Hocking Valley & Toledo Railway Company and said Brown, a true copy of which agreement is annexed to this answer and made a part hereof as Exhibit "C."

That at or about the same time the said Burke and Hickox agreed with the said Brown to furnish him with money, means, and credit whereby to attempt to acquire as cheaply as could be and failing that to subvert and destroy all the rights and equities of the defendant The American Finance Company and Mason and Jillson under said agreements, Exhibits "A" and "B," and said Burke and Hickox, or one of them for the others, to this end conferred with the agents and counsel for the said Brown in order to devise means whereby the said Brown should embarrass, delay, and frustrate the objects and ends of the said agreements, Exhibits "A" and "B," in the interest of the said Columbus, Hocking Valley & Toledo Railway Company.

That pursuant to the said agreements and understandings with Burke and Hickox the said Brown, as agent for the said Burke and Hickox, did institute a certain action in his own name in the supreme court of the State of New York against this defendant, American Finance Company, and Mason and Jillson, asking to have the said agreements, Exhibits "A" and "B," cancelled for alleged fraud in their procurement and because of alleged usury at
155 the inception of the said several agreements, Exhibits "A" and "B," which pretenses and allegations were then well known to said Brown to be false.

That subsequent to the institution of such suit the said Burke and Hickox by no act of their own ceased to be directors and officers of the said Columbus, Hocking Valley & Toledo Railway Company, and thereupon said Burke and Hickox for the first time pretended and gave out that they had acquired whatever interest said Theophilus P. Brown had in the said Toledo, Columbus & Southern Railway Company under said agreements, Exhibits "A" and "B," in the private right of them, said Hickox and Burke, and not as agents and trustees of the said Columbus, Hocking Valley and Toledo Railway Company, although so it was, as this defendant is informed, said Burke and Hickox used the money and credit of said Columbus, Hocking Valley & Toledo Railway Company in effecting the same.

That the said Burke and Hickox and their agent, Brown, subsequently and on or about the 16th day of December, 1886, became satisfied that they could not succeed in their unlawful attempt to wreck and subvert the rights of Mason and Jillson, the parties to the said agreements, Exhibit B, and thereupon said Burke and Hickox entered into a treaty with said Mason and Jillson for the purchase of their rights under the said agreement, Exhibit B, and so it was that on or about the 16th day of December, 1886, the said Mason and Jillson and the said Burke and Hickox entered into an agreement for the purchase and sale of the rights of the said Mason and Jillson in the Toledo, Columbus & Southern Railway Company, a true copy of which agreements is hereto annexed and made part hereof as Exhibit "D."

That it is by virtue of the said several agreements and not otherwise that said Burke and Hickox now claim to own the ma-
156 jority of the first-mortgage bonds of the Toledo, Columbus and Southern Railway Company, but they have not possession of the same and may never have such possession if they default in the terms of said agreement, Exhibit "D."

The defendant, further answering, says it is informed and believes that the American Loan and Trust Company is organized and doing business as a trust company under the laws of the State of New York, and that Rowland N. Hazard is its president, but this defendant has no knowledge whether or not it is the fact that said Hazard has assumed the direction and control of this foreclosure suit; but defendant avers that if such is the case it is recently and since the said Burke ceased to conduct the same in his own interest and that of Charles Hickox aforesaid and since this defendant was made a party to this suit by leave of this honorable court.

That this defendant has no knowledge and cannot set forth as to belief or otherwise whether it is the fact that said Rowland N. Hazard pretends and gives out that he is the owner of the majority of the stock of said Toledo, Columbus & Southern Railway Company. The defendant denies that in violation of any agreement whatever the stock of the Toledo, Columbus & Southern Railway Company was ever issued in the name of the American Finance Company as trustee; but, on the contrary, avers that the said stock was so issued to the said company by and with the consent of the owners thereof. This defendant denies that the said Burke and Hickox have demanded that said stock be assigned to them as averred in the said cross-bill or that they have any right to so demand. This defendant denies that it or its officers or agents have colluded with any one soever to prevent a foreclosure of the mortgage described
157 in the bill of complaint or to obtain possession of the mortgage property.

The defendant denies that it has instigated, aided, or abetted any suit whatever for any purpose and particularly as charged by the said Burke and Hickox, and denies that it has threatened to bring or maintain any other suits or to the end charged; and defendant alleges that the only suits and controversies connected with the Toledo, Columbus and Southern Railway Company in which defendant has any interest are suits in which this defendant appears as defendant and to protect its rights aforesaid against the unlawful contrivances and machinations aforesaid of the said Burke and Hickox and their said agent, Brown.

That whatever rights this defendant has in the subject-matter of this suit defendant will submit to the jurisdiction of this honorable court at the proper time and place having due reference to the rules of orderly procedure; that this defendant is a stranger to all and singular the other matters and things in the cross-bill contained and not hereinbefore answered or denied.

And defendant is advised and humbly submits that said Burke and Hickox have no interest in the matters in question in this suit, and the defendant craves the same benefit for this defense as if it had demurred to said cross-bill, and this defendant denies all in said bill charged; without this, that there is any matter, cause, or thing in the said cross-bill *complained* material for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is untrue to the knowledge or belief of this defendant; all of which mat-
158 ters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct.

AMERICAN FINANCE COMPANY,
[SEAL.] By J. C. SHORT, *Pt.*

ROBT LUDLOW FOWLER,
Of Counsel & Solicitor for Defendant
American Finance Co.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

John C. Short saith that he is the president of the above-named American Finance Company; that he has read the said answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to the matters thus stated he verily believes them to be true.

JOHN C. SHORT.

Sworn to before me and subscribed in my presence this 26th May, 1887.

W. F. CRITTENDEN,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

159 (EXHIBIT "A.")

Articles of agreement made and entered into on the 14th day of April, A. D. 1884, by and between Theophilus P. Brown of the city of Toledo in the State of Ohio party of the first part, and the American Finance Company, a corporation doing business in the city of New York, party of the second part, witnesseth:

Whereas, the said party of the first part is the owner of all the stock except a nominal amount, and all of the first-mortgage bonds ($800,000) of the Toledo & Indianapolis Railway Company, which said bonds are now held in hypothecation by various persons and corporations to secure the payment of certain obligations of said railway company, or said party of the first part; and

Whereas, the railway of said company extending from the city of Toledo aforesaid to the city of Findlay, in the State of Ohio, about forty-one miles, is now in the hands of and is being operated by a receiver; and

Whereas, there are sundry lien claims outstanding against said railway company and claims for right of way, labor and materials not secured by collateral, and

Whereas, said party of the first part is desirous of obtaining a loan or loans as hereinafter mentioned, for the purpose of retiring said existing claims and obligations, and is also desirous of making provision for the extension of said line of railway from Findlay aforesaid to the city of Columbus and to some point in the Hocking valley in the vicinity of Straitsville in said State and to Union City

160 or other point on the C. C. C. & I. R. R. and in furtherance of his said plans, has applied to said party of the second part for its services, assistance and facilities in obtaining means with which to discharge said existing claims and obligations and to extend the line of said railway as above mentioned, and said party of the second part has consented to render such services upon the terms and conditions hereinafter expressed.

Now, therefore, it is hereby agreed by and between the parties hereto, in consideration of the premises and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, as follows:

Article I.

Said party of the first part agrees to sell and transfer the said stock and bonds and all the property and franchises of said Toledo & Indianapolis Railway Company to a new company to be organized by said party of the second part under the laws of the State of Ohio, upon the terms and conditions hereinafter expressed and to co-operate with said party of the second part in all proper ways in bringing about the consummation of the purposes of this agreement.

Article II.

Said party of the second part agrees to proceed without unnecessary delay upon the execution of this agreement to the organization of said new railroad company, to be called the "Toledo, Columbus & Indianapolis Railroad Company," and to the procuring of the engraving of the bonds and stock for the same and of a settlement of the outstanding claims secured by the pledge of bonds as aforesaid, and to the procuring of a loan, of, say, $300,000 to $400,000 in money, as may be deemed practicable, to be made upon the pledge of said present outstanding bonds of said Toledo & Indianapolis Railway Company, or upon
161 the bonds to a like amount of the proposed new railroad company, as may be found convenient, the cash proceeds arising from such loan to be used in extending said Toledo & Indianapolis railway to a connection with the I. B. & W. R. R. at Findlay, and in taking up such of said claims as are liens prior to the mortgage made to secure said bonds, and to the settlement of all other claims, secured and unsecured, the payments on account of such settlements to be made in such manner as may be agreed upon between said party of the first part and the lender or lenders, and to be done in such a way as to extinguish all the outstanding claims against said railway company and its property.

Such loans when made are to be secured by the promissory note of said party of the first part, with said bonds at not more than fifty cents to the dollar as collateral security.

Article III.

As soon as practicable after the organization of said new railroad company, provision is to be made by it for the issue of its stock and bonds, the same to be used in the purchase of the stock, bonds, and property of said Toledo & Indianapolis Railway Company, and in the payment of said claims and obligations, and in extending said railway as above mentioned and equipping the same, it being understood that the stock of said new railroad company shall be fixed at $25,000 per mile and the bonds at $20,000 per mile, for each mile

in length of railroad built and to be built and equipped, and that the bonds are to have forty years to run, bearing interest at 6 % per per annum, payable semi-annually, in New York and to be secured by a first mortgage on all the rights, property and franchises of such new corporation.

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Article IV.

It is understood and agreed that the stock of said new railroad company to the amount of $25,000 per mile and its first-mortgage bonds to the amount of $20,000 per mile, or the net proceeds of said bonds, are to be paid for the stock bonds and property of said Toledo & Indianapolis Railway Company, and that the remainder of the bonds and forty-five per cent. of the stock to be issued by said new railroad company are to be negotiated and the proceeds thereof are to be appropriated to the construction and equipment of the remainder of the line from Findlay to Columbus and the Hocking valley and to Union City or other point as aforesaid.

Article V.

Said party of the second part also agrees to undertake the negotiation of the entire issue of the bonds and forty-five per cent. of the stock of said new railroad company for the money, means and credit necessary to retire the said securities of said Toledo & Indianapolis Railway Company, and to take up the secured and unsecured claims against the property of said last-mentioned railway company and to extend the line of said railway from Findlay aforesaid to Columbus and Hocking valley and Union City or other points aforesaid.

Article VI.

There is to be allotted and paid to said party of the second part, in consideration of the premises a commission or compensation of two and one-half per centum on the amount of money raised by said party of the second part for said party of the first part by way of loans or by means of the settlement of the claims and obligations: such commission or compensation to be payable at such time as the

163 money received from such loan or loans shall be paid over to said party of the first part by said party of the second part, or as the existing obligations secured by the pledge of bonds as collateral shall be taken up, and as said liens and other claims shall be paid by said party of the second part, it being understood that the commission mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about as result of this agreement. But it is understood and agreed that if and so for as the loan of money shall be obtained, said party of the first part is to have the right of causing the purchase of such claims and liens upon such terms as he may be able to make with the holders thereof, and that whatever discount is saved in such purchase shall inure to the benefit of said party of the first part.

Article VII.

It is also understood and agreed that said party of the second part shall have the right to negotiate the sale of the said $800,000 of bonds of said Toledo & Indianapolis Railway Company in effecting the settlement of said claims or for any other purposes which shall be approved by the said party of the first part, and is also to have the right to negotiate all the bonds and forty-five per cent. of the stock to be issued by said new railroad company for any of the purposes expressed in this agreement. But none of said bonds issued by either company are to be negotiated, sold, or otherwise disposed of at less than ninety cents on the dollar and accrued interest without the consent of said party of the first part.

Article VIII.

164 Said party of the second part is to have the right to negotiate a settlement with the parties in Chicago representing the rolling mill company and holding $401,000 of said bonds as collateral for a given sum of money due to said rolling mill company or its assigns and to use therefor bonds and stock of said new railroad company at not less than the rate herein fixed.

Article IX.

Said party of the second part is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by said railroad companies and negotiated: said ten per centum on said bonds being payable in said bonds at par, or in the net cash proceeds of the sales thereof, at its option, and on said stock in said stock at par: such payments or deliveries to be made from time to time *pro rata* as any of said bonds shall be negotiated, sold or exchanged for, outstanding liabilities or for property, labor and materials required by said railroad companies or either of them, or otherwise used or disposed of.

Article X.

In addition to the said ten per centum of stock hereinbefore agreed to be paid to said party of the second part as commission, there is to be appropriated and transferred to said party of the second part, as hereinbefore mentioned, in further consideration of the premises and of its undertakings to secure the marketing of said bonds, the forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered to said party of the second part *pro rata*, from time to time, as said bonds or any of them shall be negotiated or otherwise disposed of, as provided in paragraph last above written: but the total of said ten per centum
165 commission on stock and bonds shall not exceed ten per centum of the amount issued for each mile of road in the name of the new railroad company.

Article XI.

It is further agreed and understood that whenever the stock, bonds and property of said Toledo & Indianapolis Railway Company shall be turned over to said new railroad company to be organized as above provided, the said party of the first part is to be thereupon elected president of said new railroad company and is to have forty-five per cent. of the stock of said new railroad company and the naming of a majority of the board of directors of said new railroad company, the minority thereof to be named by the party of the second part.

Article XII.

It is further agreed and understood that the work of making the connection between the present southern terminus of said Toledo & Indianapolis railway in the city of Findlay aforesaid and said I. B. & W. R. R. is to be supervised and conducted by said party of the first part and is to be paid for out of the cash proceeds of the loan or loans herein first above referred to.

Article XIII.

It is also understood and agreed that the proceedings now pending in the United States court for the foreclosure of the mortgage given to secure said $800,000 of bonds of said Toledo & Indianapolis Railway Company, shall be prosecuted to completion, unless all outstanding liabilities of said Toledo and Indianapolis Railway Company shall be paid and discharged and the road left free to its stockholders, to be turned over to said new railroad company
166 in such a manner as to make the title of said new railroad company in said Toledo & Indianapolis property complete, free and clear. But said party of the first part is to use all proper means in his power to hasten or retard said foreclosure, as the said party of the second part may deem to be in the interest of its proposed negotiations; and when and if said sale shall take place under said foreclosure, said party of the second part shall have the right at its election to cause said property to be purchased by said new railroad company at such foreclosure sale, in accordance with the purpose of this agreement.

Article XIV.

It is hereby mutually agreed and understood by and between the parties hereto that if the loan is not obtained in time to pay off the present debts of the said Toledo & Indianapolis Railway Company (excepting its first-mortgage bonds) before said railway is sold at judicial sale, or the money provided with which to purchase the said railway at said judicial sale, the said railway shall not be so purchased by the said party of the second part, as hereinbefore provided, that this contract shall be null and void, and no compensation or commission or expenses of any kind shall be claimed by the said party of the second part; and when said loan is obtained of sufficient amount to pay off said claims, or said railway shall be

purchased at said judicial sale, as hereinbefore provided, it is agreed that unless said party of the second part shall raise money, means or credit necessary for the extension of said railroad to Columbus, Ohio, or other point to be agreed upon by the parties hereto, within one year from the date of procuring the said loan, or from the date of the purchase of said railway, then and in that case this con-
167 tract for negotiating the securities for said extension may, at the option of said party of the first part, become null and void.

Article XV.

The trust company which shall act as trustee of the mortgage securing the bonds of the new railroad company shall be selected by the concurrence of the parties hereto, and shall be from those now located in the city of New York; and all bonds, except those relating to the line from Findlay to Toledo, shall remain in the custody of said trust company until drawn out by agreement of the parties hereto. Said party of the second part hereby agrees to advance for said new railroad company all expenses of organizing it and for engraving its bonds and stock; and is to have such engraving done in such a manner as will make them eligible to be listed on the New York stock exchange; and it is also agreed that if said party of the first part procures the loan on the present bonds of the Toledo & Indianapolis Railway Company, no commission shall be claimed for the same by said party of the second part.

It is further agreed and understood that if said party of the second part shall find it necessary in conducting said negotiation to give or agree to give a majority of the stock of said new railroad company to the purchasers of said bonds, then and in that case a sufficient contribution is to be made by said party of the second part from its stock commissions herein provided for to make such majority. But in case the securities of said new company so to be organized by said party of the second part, in pursuance of this agree-
ment, shall be used in the purchase of the bonds, stock or prop-
168 erty of said Toledo & Indianapolis Railway Company, and said extension shall not be made, then and in that case said party of the first part is to have a majority of said stock; and also that it is the intention of this agreement that if the proper amount of securities of said new railroad company shall in any manner be utilized or used in acquiring said Toledo & Indianapolis Company's securities or property, said party of the second part is to be paid its commissions as hereinbefore fixed.

In testimony whereof, said party of the first part has hereunto subscribed his name, and said party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary on the day and year first above written.

P. T. BROWN.

AMERICAN FINANCE CO,

[SEAL] By J. C. SHORT, *Pt.*

Attest: WM. P. WATSON, *Secretary.*

EXHIBIT "B."

Tripartite agreement made and entered into on the 24th day of September, A. D. 1884, by and between Theophilus P. Brown of the city of Toledo, in the State of Ohio, party of the first part: the American Finance Company, party of the second part and Israel B. Mason of Providence, and Francello G. Jillson, of Woonsocket, in the State of Rhode Island, parties of the third part, witnesseth:

That whereas an agreement was entered into, under date of April 14, 1884, by and between said parties of the first and second parts (copies of which are held by each of the parties hereto) in
169 relation, among other things to the negotiation undertaken by said party of the second part for said party of the first part of the notes of said party of the first part to the amount of $325,000 and also to the negotiation of $800,000 of the stock and $800,000 of the first-mortgage bonds of said Toledo & Indianapolis Railway Co. and said party of the second part has requested said parties of the third part to take said notes on behalf of themselves and associates, and said parties of the third part have consented thereto, upon and subject to the terms and conditions herein expressed, and subject to the consummation of all the details to the satisfaction of all the parties hereto.

It is therefore hereby agreed by and between the parties hereto that said terms and conditions are and shall be as follows:

1. Said Brown is to make, endorse and deliver his several promissory notes in approved form and denominations, payable to his own order within two years from this date, with interest at six % per annum from date, said interest to be payable semi-annually and said notes to be accompanied by first-mortgage bonds of said Toledo & Indianapolis Railway Co., at the rate of fifty cents on the dollar as collateral security, said bonds bearing coupons maturing April 1, 1885, all past-due coupons and those maturing October 1, 1884, being first taken off and cancelled.

2. The net proceeds of said loan are to be applied to the purchase and taking up of the present outstanding claims against said T. & I. Railway Co. and its property, secured and unsecured (including the purchase by said Brown of the interest of Patrick Dowling, contractor, in said railway) and to the payment of the expenses incident thereto: and also to the building of an extension of said
170 railway from its present southern terminus to a connection with the Indiana, Bloomington & Western and the Lake Erie & Western railroads at Findlay, O., and also to the payment of the balance due on rolling stock heretofore purchased by said Toledo & Indianapolis Railway Company.

3. All the outstanding claims so purchased and taken up as aforesaid by the use of the proceeds of said loan are to be so far as practicable, assigned in blank or to said American Finance Company, in trust, as may be found advisable, and are to be delivered to said American Finance Company to be held by it in trust as follows:

When all the claims not secured by said first-mortgage bonds as collateral shall have been purchased and taken up, the same are to be forthwith cancelled; but this stipulation shall not prevent the cancellation at any time of any portion of said claims not secured by bonds as collateral, whenever said first and third parties may agree to such cancellations and all claims secured by bonds as collateral which shall be so purchased and taken up are to be assigned and delivered to said American Finance Company in trust, for the common use, benefit and protection of all holders of said first-mortgage bonds. And when said loan shall be paid, or sooner, if the parties hereto shall agree, said claims so secured are to be cancelled.

4. If any of the proceeds of said loan shall remain after the purchase and delivery of said claims as above provided, such residue shall be then paid over to said Brown.

5. All the $800,000 full-paid stock of said Toledo & Indianapolis Railway Co. (except a nominal amount thereof held by the directors for qualification) is also to be issued and deposited with said American Finance Co. and is to be disposed of as follows:

171 Upon the payment of said loan, or in case of default of such payment, there is to be issued and delivered by said trustee to said parties of the third part, $360,000 of said stock; to said Brown $408,000 thereof, and to said American Finance Co. $32,000 thereof; the same to be issued in the names of said parties respectively.

6. A bonus of ten per cent. on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of such purchase, in the first-mortgage bonds of said Toledo & Indianapolis Railway Co. at par.

7. Upon the purchase, assignment and delivery of the claims secured by the pledge of first-mortgage bonds, such action shall be taken in relation to the receivership, taking judgment on such claims or the entering of a decree of foreclosure or the dismissal of the suit of the Union Trust Co. of New York, trustee, now pending as the parties hereto may deem best, it being understood that upon the request of the holders of said notes, said Brown, acting as president of said Toledo & Indianapolis Railway Co. is to forward or retard all legal proceedings now pending or such as may be hereafter commenced, as the holders of said notes may deem advisable.

8. The net proceeds of said notes are to be deposited in such bank or trust Co. as the said Mason and Jillson and said American Finance Company may designate; such deposit to be made for the credit and account of said "American Finance Co. trustee" in trust for disbursement by it for the purposes hereinabove expressed.

9. All the remainder of said $800,000 of first-mortgage bonds of said Toledo & Indianapolis Railway Co. over and above the

172 $650,000 of the same pledged to secure the payment of said $325,000 of said notes are hereby appropriated as follows: To the purchasers of said notes their said bonus, amounting to $65,000

thereof, to be distributed among them *pro rata* according to their respective holdings of said notes.

2. To said American Finance Co. $80,000 thereof, in full payment of all its claims for commissions for negotiating said $800,000 of said bonds. 3. To said Brown $5,000 thereof; such appropriations and the delivery of said bonds to be made from time to time *pro rata* as said notes are disposed of.

10. It is also further agreed and understood that when the proposed new railroad company contemplated and provided for in said agreement between said first and second parties hereinabove referred to shall have been organized and shall issue its bonds and stock for the purchase of the bonds and stock of said Toledo & Indianapolis Railway Company, to a like amount now outstanding, and for extending said railway to Columbus, O. and said purchase shall be consummated, said Brown is to receive all the excess of bonds and stock to be issued in payment for said T. & I. railway, which shall be issuable by said new railroad Co. at the rate of $20,000 per mile of each (bonds and stock) for all the road which shall be in operation from the tracks of the I. B. & W. and the L. E. & W. railroads at Findlay, O. to Toledo, O. after providing for said outstanding stock and bonds of said T. & I. railway Co. it being understood that the road now in operation is about forty miles in length and that when said connection or extension at Findlay is completed, there will be over forty-one miles in length, upon which bonds and stock of the new railroad Co. are to be issued at the rate of $20,000 per mile of each.

173 11. In consideration of the personal services of said Mason and Jillson in the examination of said Toledo & Indianapolis railway, and of the responsibility assumed by them as endorsers and in bringing their associates into the loan, it is agreed that when the $650,000 of said bonds pledged as collateral as aforesaid are sold and said loan is paid and said Brown is entitled to receive the excess over and above the payment of said loan, said Mason and Jillson are to receive $50,000 of said bonds, or the proceeds of the sale thereof, to their own personal use.

12. It is agreed that until said loan is paid, all the net earnings of said Toledo & Indianapolis Railway Co. from the time of its completion to a connection with said I. B. & W. and said L. E. & W. railroads, are to be applied as follows:

1. To the payment of the interest on said notes: 2. To the payment of the interest on said remaining $150,000 of bonds: and 3. To the payment of interest on said $650,000 of said bonds.

But it is also agreed and understood that in case such net earnings, when so applied, shall not be sufficient to pay such interest and coupons from the date of the making of the connection with said railroad last above named to the maturity of said loan, that no default is to be taken or declared on said coupons maturing prior to the maturity of said loan, and no proceedings at law shall be taken against said Toledo & Indianapolis Railway Co. to enforce the payment of the same; but this provision shall not be construed to prevent such proceedings from being commenced and prosecuted

at any time subsequent to the maturity of said loan, nor to abate to any extent the amount of interest and coupons so to be paid.

174 In testimony whereof, the several parties hereto have subscribed this agreement on the day and year first above written.

T. P. BROWN,
AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*
I. B. MASON.
FRANCELLO G. JILLSON.

EXHIBIT "C."

Memorandum of agreement between T. P. Brown, of Toledo, Ohio and the Columbus, Hocking Valley and Toledo Railway, made this 10th day of December 1885, as follows:

Whereas, said Brown is largely interested in the Toledo, Columbus and Southern Railroad Company, a company having a line constructed from Toledo to Findlay, Ohio; and

Whereas, the Columbus, Hocking Valley and Toledo Railway Company is desirous of obtaining said railroad for the purpose of using the same as a branch or feeder to its line, and

Whereas, the said Toledo, Columbus and Southern Railroad Company is now represented in bonds to the amount of eight hundred and twenty-five thousand dollars and like amount of stock: and

Whereas, said Brown is the owner of about four hundred and thirty thousand dollars, par value, of said stock, and of about six hundred and fifty thousand dollars of the bonds of said company and

Whereas, he had heretofore borrowed upon the bonds of said company pledged by him, the sum of three hundred and twenty-five thousand dollars and interest, and has made other
175 arrangements touching the bonds and stock of said company; and

Whereas, it is believed to be for the interest of the parties hereto to make such arrangements as to place the property in the hands and control of the Columbus, Hocking Valley and Toledo Railway Company, it is therefore agreed as follows:

1. That as soon as possible all the indebtedness of said Brown for which said bonds have been pledged shall be taken up and cancelled and said bonds retired and cancelled and that all the stock of said company not at present owned by said Brown shall be taken up and turned over to the Columbus, Hocking Valley and Toledo Railway Company or its nominee. That with the view of enabling said Brown to retire his said indebtedness and repossess himself of the stock and bonds held by him in said Toledo, Columbus and Southern Railroad Company the said last-named railroad company will make and execute its mortgage upon said railway lines, in the usual form, securing five hundred bonds of one thousand dollars each, drawing interest payable semi annually at the rate of five per cent.

per annum and that the payment of the interest and principal of said bonds shall be guaranteed by the Columbus, Hock- Valley and Toledo Railway Company. That four hundred and sixty thousand dollars of said bonds, or so much thereof as may be necessary, shall be appropriated to the payment of the indebtedness of said Brown as aforesaid, and the residue of said four hundred and sixty thousand dollars shall belong to said Brown unless said indebtedness shall be settled and canceloed or in some way retired for a less sum than three hundred and thirty-five thousand dollars: in which event any sum which may be saved out of three hundred and thirty-five thousand dollars shall belong to the said Columbus, Hocking Valley and Toledo Railway Company. The remaining forty thousand dollars of bonds shall be left in the treasury of the Toledo, Columbus & Southern Railroad Company as assets of the company. If it shall be found necessary to sell said bonds in order to retire the indebtedness of said Brown, he shall not be charged with a greater discount thereon than five per cent. amounting to not more than seventeen thousand five hundred dollars: but said bonds are to be sold for the highest price that can be obtained therefore, or the bonds themselves are to be used in the settlement and liquidation of such indebtedness.

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2. Said Brown shall assign and turn over to the Columbus, Hocking Valley and Toledo Railway Company, as security, his contract with Am. Finance Co. and Mason and Jillson, covering sundry bonds and shares of stock upon receiving the sum of fifteen thousand dollars in cash or notes of his satisfaction and upon the consummation of the arrangement by the retirement of the bonds and the regaining of the possession and the control of the stock of said Toledo, Columbus and Southern Railroad Company all said stock and bonds shall be retired and cancelled, or at the option of the purchaser, enough stock shall remain to equal the sum of six hundred thousand dollars of which sum the purchaser shall have four hundred thousand and said Brown two hundred thousand dollars.

3. Said Brown by his counsel or otherwise shall proceed with as much diligence as possible to acquire possession of the bonds and stock aforesaid and to deliver the same to the purchaser for cancellation under this contract. The details of the reorganization, cancellation of bonds and stock and the issue of new bonds and stock shall be such as shall be advised by counsel and reasonably adapted to the purpose of the complete reorganization of said Toledo, Columbus & Southern Railroad Company upon the basis contemplated by this memorandum. Said Brown shall remain as at present in charge of the affairs of the said last-named railroad company until this arrangement is fully consummated, and shall receive the salary which he is at present receiving. Both parties to aid in every way possible to consummate the change contemplated hereby as rapidly as possible.

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If said purchase shall be fully consummated, said Brown shall own and retain said sum of $15,000 as part of the purchase money; but if for any reason it shall fail to be carried out, said sum of $15,000

shall be repaid to said ry. company with interest, and the security held surrendered.

Subject to approval of board.

(Signed) THE COLUMBUS, HOCKING VALLEY & TOLEDO R'Y CO.
By S. BURKE, *V. Pres't.*
T. P. BROWN.

Approved by board of directors December 12th, 1885.
W. M. GREENE,
Sec'y C., H. V. & T. R'y.

EXHIBIT "D."

(Copy.)

Whereas, Israel B. Mason and Francello G. Jillson of Providence, Rhode Island, hold and own all the promissory notes of Theophilus P. Brown, Toledo, Ohio, mentioned and referred to in a certain contract between said Mason and Jillson, said Brown and the American Finance Company, dated September 24th, 1884, (a copy of which is hereto attached) excepting one of said notes for the sum of $10,000 the principal of which said notes so held and owned by said Mason and Jillson amounts in the aggregate to the sum of three hundred and fifteen thousand dollars ($315,000) the interest upon which has been paid up to Sept. 24th, 1885, leaving due and unpaid upon said notes held and owned by said Mason and Jillson $315,000, with
178 interest at the rate of six per centum per annum, payable semi-annually from September 24th 1885.

And whereas, said Mason and Jillson hold six hundred and thirty of the first-mortgage bonds of the Toledo, Columbus & Southern Railway Company as collateral security to said promissory notes, and also hold and own sixty-three other of the said first-mortgage bonds of said railway company, referred to in said contract as bonus bonds—each of said first-morigage bonds being for one thousand dollars—together with the coupons maturing on and after January 1st, 1886.

Now the said Mason and Jillson, the first party, in consideration of the payments, covenants and agreements hereinafter stated of Stevenson Burke and Charles Hickox of Cleveland, Ohio, the second party do hereby agree to sell and deliver unto said second party, without any recourse upon said first party or either of them in any event whatsoever, the said notes of Theophilus P. Brown, the principal of which amounts to three hundred and fifteen thousand dollars as aforesaid, and also all their right, title and interest in said six hundred and thirty collateral first-mortgage bonds and said sixty-three bonus first-mortgage bonds.

In consideration whereof the said second party have this day paid upon the amount of the principal of said notes, the sum of ninety thousand dollars ($90,000) the receipt whereof is hereby acknowledged and do hereby assume and agree and promise to pay to said

first party at the Chemical National bank, New York, within one year from this date, the amount of the balance of the principal of said notes, to wit: two hundred and twenty-five thousand dollars ($225,000) and also on the 24th day of March 1887 at the
179 office of the Rhode Island Hospital Trust Company of Providence, Rhode Island, all the past-due interest upon said notes together with all the interest that shall accrue upon said notes up to and including said 24th day of March 1887, with said sum of ninety thousand dollars this day paid upon said notes and credited as of this date. And until the said balance of said principal of said notes is paid, said second party further agree to pay to said first party interest at the rate of six per centum per annum, payable semi-annually from said March 24th 1887, at said trust company, on said sum of two hundred and twenty-five thousand dollars, the balance of said principal of said notes as aforesaid. And as an additional consideration, said second party have this day paid to said first party the further sum of ten thousand dollars, the receipt of which is hereby acknowledged. In case said second party elect to pay the remainder of said principal of said notes before the expiration of said one year, they shall give ten days' notice thereof to said first party.

It is further hereby agreed between said parties that either of said parties may at any time elect to declare the principal sum of said six hundred and ninety-three first-mortgage bonds to be due and payable in accordance with the mortgage or deed of trust made by said railway company to secure the payment of the same. But in the event that a sale is had of the railroad and property of said Toledo, Columbus & Southern Railway Company before the full payment of the residue of the principal and interest of said notes as hereinbefore provided, that said second party are to and hereby agree to substitute at least ten days before said railroad and property may be offered for sale other collateral security sufficient to secure the principal and interest of said notes then
180 remaining unpaid to the satisfaction of said first party.

In the event of the failure of said second party to promptly pay any of the sums of money hereinabove provided to be paid to said first party by said second party, or to substitute other collateral securities to the satisfaction of said first party as hereinbefore provided, then the said first party shall forthwith have all the rights and remedies as to said mortgage bonds entitling and enabling them to take any step or steps or proceedings to secure or enforce or obtain the payment of their remaining debt which at any time prior to this contract they had in or with respect to said bonds, as well as the right to enforce the aforesaid personal promise and obligation of said second party to pay and discharge said remaining debt.

It is further agreed that the said second party will, to the extent they can do so, cause the suit of the American Loan & Trust Company now pending against said railway company in the circuit court of the United States for the western division of the northern district of Ohio, to be prosecuted to final decree and a sale of said railroad

made thereunder and will indemnify and save harmless the said first party against the costs and expenses thereof, excepting the counsel fees of the solicitors of record for said complainants up to this date, viz., A. S. Bowman and R. A. Harrison, which fees up to this date are to be paid by said first party.

Upon the payment of the principal and interest of said notes in full by said second party the said first party are to deliver the said notes and the said bonds held by them to said second party,
181 and also to surrender and release all their rights and interests of every kind whatsoever (including all their interest in the capital stock of said company) under the contract of September 24th 1884 aforesaid to said second party. And the said Theophilus P. Brown hereby assents to the foregoing agreement between said first party and said second party, the same having been entered into at his request. It is further agreed that upon said full payment of the principal and interest of said notes by said second party, the said first party will also direct said American Finance Company so far as the first party have any authority to do so, to cancel any claims which were purchased and taken up as provided in sections 2 (two) and 3 (three) of said contract dated September 24th 1884.

It is further agreed that no interest is to be computed upon the said instalments of interest which became due and payable respectively on said March 24th 1885 and September 24th 1886.

In witness whereof we have hereunto set our hands this 16th day of December A. D. 1886; this agreement being executed in duplicate.

ISRAEL B. MASON,
FRANCELLO G. JILLSON,
By RICHARD A. HARRISON AND
S. A. BOWMAN, *Their Attorneys.*
STEVENSON BURKE.
CHARLES HICKOX.
THEOPHILUS P. BROWN.

We, the said Israel B. Mason and Francello G. Jillson, do hereby confirm the foregoing contract, at Providence, Rhode Island, this 20th day of December, A. D. 1886.

ISRAEL B. MASON.
FRANCELLO G. JILLSON.

182 Afterwards, to wit, on the 10th day of June, A. D. 1887, there was filed in the clerk's office of said court the following answer to intervening petition, to wit:

Answer of American Loan and Trust Company to the Intervening Petition of Stephenson Burke and Charles Hickox.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Plaintiff,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

The answer of the plaintiff, The American Loan and Trust Company, to the cross-bill or intervening petition of Stephenson Burke and Charles Hickox filed herein.

This complainant, reserving unto itself all right of exception to the said cross-bill or intervening petition, for answer thereto saith that it may be true for anything this complainant knows to the contrary that the said Stephenson Burke and Charles Hickox are the owners of a large majority of the bonds of the defendant railway company, secured by the mortgage mentioned in this complainant's bill, to wit, over $700,000 thereof, but this complainant is an utter stranger to all and every of the facts relating to the ownership of said bonds and cannot form any belief concerning the same.

And this complainant, further answering said cross-bill or intervening petition, admits that it is a corporation organized and doing business as a trust company under the laws of the State of New York, and that one Rowland N. Hazard is its president and
183 one of its executive officers, and it admits that, in conjunction with its other executive officers and with its executive committee, but it denies that otherwise, he has direction and control of its business, but it denies that said Hazard has assumed the direction and control of this suit in any other sense or to any greater extent than pertains to the proper and ordinary discharge of his duties as president of this complainant in respect to a suit brought by it in the discharge of its duty as trustee.

And this complainant says that it does not know and has never been informed save by unreliable rumor and the said cross-bill or intervening petition of said Burke and Hickox whether they, the said Burke and Hickox, are the owners of a large majority of the stock or of any of the stock of said railway company, and it leaves them, the said Burke and Hickox, to make such proof thereof as they shall be advised is material; and this complainant, further answering said cross-bill or intervening petition, admits that the said Rowland N. Hazard, not as president of this complainant nor in his official capacity, but solely in his individual capacity, claims that he, in his individual right, is the owner of the majority of the stock of said railroad company and claims to have purchased the same since the commencement of this action and during its pendency, and that he did institute and conduct substantially such pro-

ceedings for the assertion, maintenance, and protection of the rights which he claims, as such stockholder, as are set forth and described in said cross-bill or intervening petition, but this complainant denies that the said Hazard has assumed any attitude whatever towards the defendant railway company, except that of a stockholder thereof seeking to maintain his rights as such against
184 other parties, including the said Burke and Hickox, who were seeking to gain control of the organization of said railway company in opposition to the rights and interests which said Hazard claims as a stockholder thereof, and this complainant denies that the personal interest of said Hazard or any attitude which he has assumed towards the defendant railway company renders this complainant either incompetent or incapable of faithfully and impartially administering the trust conferred upon it by the execution of the mortgage aforesaid, or renders it or any of its officers hostile to the real owners or beneficiaries of the bonds secured by the mortgage which it is seeking to foreclose, and it denies that the said Hazard has retarded the progress of this litigation in the slightest degree, either in his own interest or in the interest of any other person.

And the said complainant, further answering said cross-bill or intervening petition, says it may be true, for all this complainant knows to the contrary, that the contracts set out in the answer of the defendant railway company and Theophilus P. Brown heretofore filed herein provided for the issue *of* the said defendant railway company and said defendant Brown — $408,000 of the stock of said defendant railway company and to the parties named in the said contracts, Israel B. Mason, Francello G. Jillson, of $360,000 of said stock, but this complainant is an utter stranger to all and every such matters and cannot form any belief concerning the same, and this complainant submits to this honorable court that all and every said matters are matters of the legal construction of said contracts, with which this complainant has nothing to do, in respect to which it, as trustee of the said mortgage, has undertaken
185 and is charged with no duty, and matters which are wholly irrelevant in this suit; and this complainant, further answering said cross-bill or intervening petition, says it does not know and has never been informed save by the said intervening petition and the answer therein referred to whether the American Finance Company, through its vice-president, F. A. White, who was elected president of the defendant railway company, and his son, whom he caused to be elected the secretary thereof, in violation of said agreement, issued the said stock in the name of the American Finance Company as trustee; nor whether the said Burke and Hickox ever purchased all the interests of said Brown or all the interests of said Mason and Jillson; nor whether they became the owners of the said stock or the bonds of the said company; nor whether they demanded that said stock be assigned by said trustee to them, and it leaves said Burke and Hickox to make such proof thereof as they shall be advised is material; but this complainant denies that said Hazard, said White, and said Short, the president of the said finance

company, have been acting together or in collusion for the purpose of preventing a foreclosure of said mortgage or of obtaining the possession of said property.

And this complainant, further answering said cross-bill or intervening petition, says that it does not know and has never been informed save by the said petition whether a number of suits have been or any suit has been commenced in the State courts or in this court, instigated either by the said American Finance Company or by its officers, for the purpose of complicating the administration of the said property or the foreclosure of said mortgage, and it leaves the said Burke and Hickox to make such proof thereof as they may be advised is material.

186 And this complainant, further answering the said cross-bill or intervening petition, denies upon information and belief that the suit of the said Hazard or the injunction obtained thereon is for the purpose of or will result in further complicating the difficulties growing out of the controversies between the claimants to said stock, or is calculated to seriously affect the property or its value as a security to the holders of said bonds, or to seriously affect the holders of stock in said railway company; and it denies upon information and belief that the said suit of said Hazard or the injunction obtained thereon have prevented or are preventing the lawful election of a board of directors of said company.

And this complainant, further answering said cross-bill or intervening petition, says that it does not know and has never been informed save by said intervening petition whether or not other suits are threatened in the State courts by said parties or any parties for the purpose of taking said property out of the jurisdiction of this court and administering it in the interest of parties who are in fact not the owners of the same or any part thereof, and it leaves the said Burke and Hickox to make such proof thereof as they may be advised is material; and it submits to this honorable court that such threats, if made, are idle and childish and do not afford ground for any action on the part of this court and cannot in any way affect the rights or interests of the holders of any of the bonds secured by the mortgage sought to be foreclosed in this suit.

And this complainant, further answering said petition, says that it is now and at all times since the commencement of this
187 suit has been willing and desirous that this court should assume the entire control and management of the said property until the final decree herein; that early in progress of this suit it asked this court to assume such control and management by the appointment of a receiver of said property, and that, so far as this complainant is informed, the defendant Brown and those who cooperated with him for a time in defending and delaying this suit are the only parties who have at any time opposed the appointment of such receiver.

This complainant admits that a number of parties have intervened in this action setting up various claims as to the bonds and property and upon liens to the same, and that suit has also been commenced in this court ostensibly for the purpose of setting aside the

sale heretofore made by this court of the property or part of it in the controversy herein in a former action of the Union Trust Company against the Toledo & Indianapolis Railway Company, but it does not know and has never been informed save by the said intervening petition of the said Burke and Hickox whether any other actions have been commenced in the State courts for the purpose of establishing liens upon the said property or claims thereto, and it leaves the said Burke and Hickox to make such proof thereof as they may be advised is material, but it denies upon information and belief that any such suits or actions have been instigated by any persons who have been acting with the finance company and said Hazard in embarrassing, delaying, and attempting to defeat the rights of said Burke and Hickox or either of them to their bonds or the security therefor, and it denies upon information and belief that said finance company or said Hazard have been in any way
188 embarrassing, delaying, or attempting to defeat the rights of said Burke and Hickox or either of them to their or his bonds or the security therefor. This complainant admits upon information and belief that a copy of the petition of the said Rowland N. Hazard filed in the said court of Lucas county, upon which the injunction mentioned in said intervening petition was obtained, was filed with said intervening petition, but it submits to this honorable court that nothing in said petition of said Hazard or in the intervening petition of said Burke and Hickox herein warrants or calls for the removal of this complainant as trustee aforesaid, and it avers and submits that at all times since the commencement of this action it has been and still continues to be desirous of discharging its whole duty as trustee under said mortgage without partiality or favor; that it has never, at any stage of this suit, failed in the discharge of any duty which it owed to any of the holders of said bonds; that it has not hindered or delayed the proceedings herein or in any way interfered with or embarrassed any of the holders of said bonds in asserting or maintaining their rights; that in the month of January, 1887, it accepted and forwarded to the counsel of said Burke and Hickox, Messrs. Doyle & Scott, to be filed in this court, a supplemental bill herein, substantially in the form proposed by said counsel, and also suggested to said counsel that they should arrange for a hearing before this honorable court, at which an early application could be made by consent of all the parties in interest for a decree of foreclosure herein; that no acknowledgement of the letter containing such suggestion was received from said counsel until some time in March, 1887, and then nothing was said about any such hearing, and that, as this defendant is advised and
189 believes, there has been no time at which this complainant could properly move for a decree of foreclosure herein until the June term, 1887.

And this complainant, further answering the said intervening petition, denies all and all manner of unlawful combination and confederacy wherewith it is by said intervening petition charged; without this, that there is any other matter, cause, or thing in said petitioners' intervening petition contained material or necessary for this

complainant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is not true to the knowledge or belief of this complainant; all which matters and things this complainant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in its original and supplemental bill heretofore filed herein.

AMERICAN LOAN & TRUST CO.,
[SEAL.] By R. N. HAZARD, *Pres't Complainant.*

BLAIR & RUDD,
E. D. POTTER, JR.,
Complainant's Solicitors.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss.:*

Rowland N. Hazard, being duly sworn, doth depose and say that he is the president of the American Loan and Trust Company, the corporation named as complainant in the above answer to the cross-bill or intervening petition of Stephenson Burke and Charles Hickox, and that by reason of his said office he has acquired and possesses particular knowledge of the matters stated in said answer; that he has heard read the said answer, and that the same is true of his own knowledge except as to the matters which are
190 therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

R. N. HAZARD.

Subscribed and sworn to before me this 8th day of June, A. D. 1887.

Witness my hand and official seals.

WILLIAM H. CLARKSON,
Commissioner for the State of Ohio in New York and Notary Public for New York County, N. Y.
[COMMISSIONER'S SEAL.]
[NOTARIAL SEAL.]

191 Afterwards, to wit, on the 23rd day of June, A. D. 1887, there was duly entered on the journal of said court the following decree, to wit:

Decree for Sale.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and THEOPHILUS P. BROWN, Defendants.

This cause came on to be heard at this term of the court before the Hon. Howell E. Jackson, circuit judge, and Hon. Martin Wel-

ker, district judge, upon the bill of complaint and supplemental bill filed herein by the complainant, the answers to the original and supplemental bill, the exhibits and testimony, and was argued by counsel; and thereupon, upon full consideration thereof, it was ordered and decree- as follows, viz:

The court find from the pleadings, exhibits, and testimony that prior to the 22nd day of April, 1885, the defendant The Toledo, Columbus and Southern Railway Company was a corporation duly incorporated and organized by and existing under the laws of the State of Ohio and has since continued to be; that it had its line of railroad and principal office in said northern district and western division; that on the said 22nd day of April, 1885, said defendant railway company was the owner of and operating a line of railway,

192 with appurtenances, which is hereafter particularly described, extending from a point in the city of Toledo, Lucas county, Ohio, to a point in Findlay, in the county of Hancock, Ohio, and that on the date aforesaid, in pursuance of its proper corporate authority and by due authority of its stockholders and directors, it did execute its certain 800 bonds of one thousand dollars each, dated the day last aforesaid, payable to the American Loan and Trust Company or bearer, payable on the 1st day of July, 1925, in gold coin of the United States, at the office of the financial agent of said company, in the city of New York, with interest from the 1st day of July, 1885, payable semi-annually in like gold coin on the 1st days of January and July of each year upon the presentation and surrender of the coupons and interest warrants attached to said bonds and specifying said semi-annual payments of interest.

And the court further finds that subsequently and for the purpose of paying for an extension of its said railway from its then terminus to a connection with the Indianapolis, Bloomington & Western railroad at Findlay the said company did, in like manner, lawfully issue twenty-five other of said bonds of equal amount, tenor, and effect, with the same date of maturity, rate of interest, and form of coupons, and the same being like the said 800 bonds in all respects and payable at the same place and time, and that said 800 bonds and said 25 bonds are outstanding as legal and valid obligations of the said defendant company, and that 89 others of the bonds of said company of like tenor and effect in all respects are outstanding in the hands of persons who claim to hold the same as collateral security for certain indebtedness alleged and claimed to be owing to the respective holders by said defendant corporation,

193 but the validity of such indebtedness and the right to hold said 89 bonds or any of them by the said parties or any of them is disputed and denied by the defendants and the right to hold the said bonds or the validity of their issue or the indebtedness for which they are held is not now determined, but continued for hearing and determination hereafter as it may become necessary or proper herein.

And the court further finds that on the said 22nd day of April, 1885, the said defendant railway company, by due corporate authority and the authority of its stockholders and directors, made, executed,

and delivered to the complainant as trustee, its successors and assigns forever, for the necessary and lawful purposes of said defendant railway company and upon sufficient consideration, its deed of trust and mortgage, which trust was duly accepted by complainant and the said deed of trust or mortgage thereafter and in due time duly recorded in the offices of the several recorders of the various counties in which or through which the property of the defendant company existed or might exist thereafter under its corporate power to acquire the same, which deed of trust or mortgage did grant and convey to the said complainant trustee all and singular the estate and property, real, personal, and mixed, which is now owned and acquired or which may hereafter be owned or acquired by said party of the first part, and all fixtures, right, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind, whether now held or owned or occupied by or belonging to the said party of the first part or at any time hereafter acquired by or for the use of said railroad or in connection therewith, including all and singular the lines of railroad of the defendant company known
194 and designated as the Toledo, Columbus and Southern railway, beginning at a point in the city of Toledo, Lucas county, Ohio, and running thence through the counties of Lucas, Wood, and Hancock to the city of Findlay, in said Hancock county, and thence through said city of Findlay and through said county of Hancock to and through the counties of Hardin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs to the town of Belpre, on the Ohio river, and also all and singular the lands, railroads, tracks, superstructures, rails, laid or to be laid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, way and rights of way, depots, station-houses, engine-houses, car-houses, freight-houses, warehouses, buildings and repair shops and machine shops, built or to be built, depot grounds and lands secured, provided, or intended for use for that purpose, lands used, procured, or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges, whether now belonging or appertaining to or used or procured or designated to be used in connection with said railroad or by it or in the maintenance or operation thereof or any part thereof or which shall at any time hereafter belong to or appertain to said railroad or to be owned or obtained by said company, and also all the locomotives, tenders, passenger cars, freight cars, baggage cars, and other cars and all other rolling stock and equipment and all machinery, tools and implements, rails, chairs, and spikes and other materials whatsoever now owned or possessed by said railroad company for the uses or purposes or designed for use in connection with or for the operation, maintenance, and repair of its lines of railroad or any part thereof or the equipment or appurtenances or which it
195 may hereafter at any time acquire, own, be interested in, or entitled to, and all and singular the rights, privileges, and franchises which the said railroad company holds, possesses,

or is entitled to or which it shall hereafter acquire or become possessed of or entitled unto for any purpose, and also all the tolls and incomes of the said lines of railroad, together with all and singular the tenements, hereditaments, and appurtenances of the premises aforesaid or any of them or any part thereof, with all the privileges and appurtenances, rents and profits, reversions, remainders, and all estate, right, title, possession, interest, claim, and demand in law and equity in and to any of the same, present and future—

In trust, nevertheless, for the equal and *pro rata* use, benefit, and security of all persons or corporations who shall become or be the lawful owners or holders of the said bonds of said company which shall by it be issued or of any of the coupons appertaintng thereto without preference of any of said bonds over any other thereof by reason of priority in the issue or negotiation thereof or otherwise howsoever; that said mortgage recited the contemplated issue of five millions of dollars of said bonds for the purpose of extending its said road from Findlay south through the counties aforesaid, the said bonds beyond the 800 originally issued to be used for that purpose only at the rate of $20,000 per mile; but only the bonds hereinbefore recited were issued under said power and the 825 bonds above recited and such of the 89 bonds, if any, as may be found to be lawfully issued are alike secured by the said mortgage and stand upon an equality under the same.

And it is further found by the court that it is provided
196 in said bonds and trust deed and mortgage that if default shall be made in the payment of the interest thereon or any part thereof and the said default shall continue for a period of six months the principal sum of said bonds and the whole principal moneys mentioned therein and secured by the whole of said bonds outstanding, together with the interest thereon, shall, upon the option of the holders of one-quarter of said outstanding bonds, become and be considered as forthwith due and payable, although the period limited in such bonds for the payment thereof shall not then have expired, and said trustee was thereunpon authorized to cause said premises to be sold.

And the court further finds that the instalments of interest on said bonds due upon the first day of January, 1886, and July first, 1886, have not been paid nor any part thereof, and none of the coupons then maturing have been paid or redeemed, and more than six months has elapsed since the default therein, and the instalments of interest due on the first day of January, 1887, have not been paid nor has any part thereof, and none of the coupons then maturing have been redeemed and said defendant company has povided no means or money for the payment of the same, and it was further provided in said mortgage that if default be made in the payments of principal or interest of said bonds for more than three months the said trustee, upon written request of the holder of one-fourth of said bonds outstanding, might enter upon and take possession of said property or foreclose the same, and more than three months have elapsed since said last default, and more than six months hav-

ing elapsed since said first and second default and the holders
197 of more than a majority of said bonds outstanding, to wit, of more than six hundred of said bonds, having elected to treat the whole of said debt as due, and having notified said trustee thereof and requested said trustee to foreclose said mortgage as set forth in its said supplemental bill of complaint, the court finds that the whole amount of said outstanding bonds, principal and matured interest, is due and payable, and the same remaining unpaid default has been made therein, and the said complainant is entitled to a decree of foreclosure of said mortgage and a sale of the property covered thereby to pay the amount due upon said bonds.

And the court further finds that there is due and payable to the legal owners and holders of said 825 bonds and to complainant, as trustee, for the use and benefit of said owners and holders, the full face thereof and interest thereon according to the coupons thereon maturing January 1, 1886, and July 1, 1886, and January 1, 1887, with interest from said dates respectively and interest on the principal thereof from the date of the last maturing coupons, evidenced by the coupons next maturing, and if reserves for future consideration and determination all the questions as to the other 89 bonds above mentioned, with leave to any person holding or claiming the same to intervene herein, setting up such claim or interest, the instalments of interest aforesaid on the 825 bonds aggregating seventy-four thousand two hundred and fifty dollars, with interest from their respective maturity, and the principal thereof being eight hundred and twenty-five thousand dollars, exclusive of said 89 bonds, as to which all questions are reserved.

Wherefore it is further ordered and adjudged that the said defendant railway company pay or cause to be paid the amount
198 aforesaid found to be due within ninety days from the entry hereof and the costs herein expended in the matter of obtaining this decree of foreclosure and all increase costs that may hereafter arise, and in default of such payment all equity of redemption of the said defendant, The Toledo, Columbus and Southern Railway Company, in the said mortgaged premises and all the property of the said company whenever or at what time soever acquired or wheresoever situated within the terms of said mortgage embraced or included be, and the same is, forever barred and foreclosed.

And it is further ordered, adjudged, and decreed that said railroad of the Toledo, Columbus & Southern Railway Company running from the city of Toledo, Ohio, through the counties of Lucas, Wood, and Hancock, to the city of Findlay, in said State of Ohio, including the right of way and the land occupied thereby, together with the superstructure and the tracks thereon and all material procured and to be procured therefor, and all bridges, viaducts, culverts, fences, depot grounds, and all real estate of whatever name or nature owned by or conveyed to said company, and all interest in such real estate which said company holds, whether legal or equitable, machine shops, station-houses, wood-houses, buildings, and all the appurtenances thereunto belonging, be sold and all property of any kind, real or personal, by said defendant company acquired

in any of the other counties named in said mortgage through — it was proposed to extend its said railway.

And it is also ordered, adjudged, and decreed by the court that all of the personal property of every name and nature belonging to said railway company be also sold, including engines, tenders,
199 cars, materials, wood, coal, and all articles and implements connected with the equipment, working, operating, conducting, and repairing of said railroad owned by said company, and all other personal property, right thereto or interest therein, whether choses in action or in possession, and franchise, rights, and privileges of the said corporation defendant above named, meaning thereby to include in this decree and order of sale all of the property of the Toledo, Columbus & Southern Railway Company aforesaid, including its franchises and all personal and real property of whatever name or nature now held, owned, or acquired by said company embraced in said mortgage, and that all of said property hereinbefore described be sold as an entirety, the same being, in the opinion and judgment of this court, incapable of being sold separately without waste and material injury to the value thereof, but said property shall not be sold at less than six hundred thousand dollars ($600,000); and it is further ordered, adjudged, and decreed that all and singular the mortgaged premises hereinbefore described be sold at public auction by and under the direction of Wilbur F. Goodspeed, who is hereby appointed a special master commissioner for that purpose, and to that end he is hereby invested with full power in said capacity as such special master commissioner to execute and carry into effect the order of sale now made and to do and to perform all such other matters and things in the premises as is now or shall be ordered and required of him in this behalf; and said special master commissioner, before offering said property, franchises, and premises for sale, shall first advertise the time and place of the sale thereof, setting forth in such advertisement a concise and pertinent description of said subject-matter to be sold in one
200 of the principle daily newspapers printed in the city of Toledo, Ohio, for not less than 30 days prior to said sale, which sale shall be made at public auction as aforesaid in the court-room used by this court, in the Produce Exchange building, in the city of Toledo, Ohio, to the highest bidder for cash or in the first-mortgage bonds of the company, provided that if payment is made in the bonds of the company at least one hundred thousand dollars ($100,000) of the purchase-money shall be paid in cash in hand, to be returned into court for distribution.

First. In payment of all the costs accruing in this court, including also allowance to said complainant trustee on account of its trust and for its expenses herein, including its attorneys' charges and expenses, and also in payment of all taxes due and unpaid upon said railroad property to the United States or to the State of Ohio.

Second. The balance of said sums, if any such remain, together with the other proceeds of said sale, excepting the sum of $50,000, which shall be reserved and held by the court until the final adjudication of the case of Thomas McGrath for himself and others

against the Toledo, Columbus & Southern Railway Company *et al.*, pending in this court, to be applied to satisfaction of the claims represented by the said Thomas McGrath in the event the court shall in said action decree plaintiff and all others whom he represents entitled to the relief prayed for in the bill filed by him therein, and that such application ought to be made, shall be applied in payment of liens and indebtedness of said The Toledo, Columbus & Southern Railway Company as the court may hereinafter order, and also provided that said bonds shall be received in payment of
201 the purchase-money to the extent of the amount the holders thereof would be entitled to be paid upon a distribution of the purchase-money received from the sale of said railroad property if the same were sold for cash.

And it is further ordered and adjudged and decreed that for the purpose aforesaid an order of sale shall be issued by the clerk of this court after the expiration of the time hereinbefore provided for under the seal thereof, embodying so much of this decree in substance as relates to the duties of the special master commissioner, and directing and requiring him to carry the same into execution and the same to return with a report to this court of his doings in the premises under this order; and if for any cause said special master commissioner shall not make sale of said property, rights, and franchises upon the order to be issued as aforesaid a further order or orders for the same purpose may be issued by the clerk of said court upon the written request of counsel for complainant until a sale shall be effected in the manner aforesaid, and the same be confirmed by the court unless hereinafter otherwise ordered.

It is further ordered that all matters involved in the various intervening petitions filed herein, and all questions as to the liens, claims, and proper distribution of the proceeds of said sale, together with the question as to the validity, ownership, and security of the said 89 bonds hereinabove mentioned, be referred to A. J. Ricks, as special master *pro hac vice*, because of his experience in such matters of accounting, to hear the same under the rules of this court and to report the testimony, with his findings of fact and law, to the
202 court at its present session or as soon as convenient, and all such questions and the final determination thereof are continued until the coming in of said report.

Any party to be at liberty to apply to the courts for its further direction on the report of said special master to be enrolled at the foot of this decree, and the court reserves herein the right to enlarge said order of reference and make such other order herein as may be found necessary and proper.

203 Afterwards, to wit, on the 18th day of October, A. D. 1887, there was filed in the clerk's office of said court the following answer, to wit:

Answer of Stevenson Burke and Charles Hickox to the Intervening Petition of Jeremiah C. King.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*

Now comes the defendants, who have heretofore by leave of court filed their intervening petition herein, and for answer to the intervening petition of Jeremiah C. King filed herein say that, reserving unto themselves all right of exception or otherwise that can be taken to the many errors, uncertainties, and imperfections in the said intervening petition contained, for answer thereto or to so much as they are advised it is material or necessary to answer say that they admit the incorporation of the Toledo & Indianapolis Railroad Company and the American Finance Company, as alleged in said intervening petition. They admit the execution of a contract between said railroad company and one Dowling, but deny that the terms thereof are correctly set forth in said intervening petition.

They have no knowledge as to whether it is true that said King furnished materials, groceries, or provisions to said Dowling or the amount thereof, as alleged on the 2nd page of said intervening petition, and therefore deny the same, and deny especially that any of the same were ever furnished for or on account of said railroad company. They deny that the terms of said contract between the railroad company and the said Dowling are correctly set forth on the 3rd, 4th, and 5th pages of said intervening petition or elsewhere in said petition, but refer to the original contract for the terms and legal effect thereof and require that the same may be strictly and correctly proved. They have no knowledge other than alleged in said petition and therefore deny that said Dowling informed the engineers, subcontractors, material men, or any other persons, including said King, as were disposed to advance goods and merchandise to said laborers and material men and others or any others that bonds and a mortgage had been executed upon the company's property, real and personal, or any property, to secure their claims and the claims of any or all others contributing to the construction of the said road, or upon the faith of that or any other representation or upon the faith of said contract said engineers, material men, subcontractors, laborers, or any other persons proceeded to push forward the construction of said road.

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They deny all of the allegations of said petition found on pages 6 & 7 thereof. They admit the foreclosure proceedings in this court in the suit of the Union Trust Company against said Toledo & Indianapolis Railroad Company and others and the sale of the property thereunder. They admit the execution of the contract alleged on page 9 of said petition, but deny that the terms or the legal im-

port of the same are correctly set forth on pages 10 & 11 of said petition or elsewhere therein, but refer to the same as heretofore exhibited herein in the answer of said company and in the
205 proof already taken herein for the true terms of the same. They deny each and every allegation contained on pages 10 & 11 of said petition.

They admit the filing by Dowling of a cross-bill in an action wherein The Union Trust Company was complainant, as alleged on page 12 of said petition, but deny each and every other allegation on said page 12; and these defendants especially deny that said King has any right to represent any other person in this action than himself. They deny that he holds any claim against the Toledo & Indianapolis Railroad Company, or which ever existed as a valid claim against said company.

They aver that all the matters and things averred in said intervening petition were adjudicated and determined by this court in the action of the Union Trust Company against said Toledo & Indianapolis Railroad Company, to the records of which action in this court reference is here made of the same as fully and completely as if said proceedings were herein set out in full and made a part hereof; that it was decreed in said action that the bonds issued by said Toledo & Indianapolis Railroad Company, as the holders thereof, were entitled to the proceeds of the sale of said property after paying other distinct and specified liens for rights of way purchased, mechanics' liens, and other specific liens on the property, aggregating in amount to much more than twice the amount for which said property was sold or which the same was then worth.

They aver that in said action all of the questions sought to be raised by the present intervening petition were adjudicated
206 and determined; that the property was sold; purchased at judicial sale; the sale confirmed; the proceeds distributed; the present Toledo, Columbus & Southern Railway Company organized; the property conveyed, and that it issued its said bonds and mortgage, covering $825,000, which were delivered to and went into the hands of the purchasers thereof for value and were finally purchased by these answering defendants in the regular course of business for value and without notice or knowledge of any defect in the title to said property or any claim or pretense of claim by said intervening petitioner or any one else to any lien or right other than the ownership of the bonds aforesaid; all of which was done publicly and with the full knowledge of the said intervening petitioner and his counsel and without objection and without notice of any kind of any pretended claim of theirs to said property.

And these defendants, further answering, say that they are utter strangers to all and every matter alleged in the petition as occurring prior to the organization of the Toledo, Columbus & Southern Railway Company and prior to the issuing of the bonds of said Toledo, Columbus & Southern Railway Company and prior to about the first of February, 1886, when they made their purchase aforesaid; and they aver that at the time of the foreclosure proceedings aforesaid the said bonds of the Toledo, Columbus & Southern Rail-

way Company were not worth the value of the amounts for which they were pledged; that the property of the said company was not then worth and could not be sold for over $150,000; that every one knew after the report of the master in the said action of the Union Trust Company against the Toledo, Columbus & Southern Railway Company that the said property of the last-named company could not be sold for enough to pay 50 per cent. of the liens as established
207 by said decree and secured by the bonds aforesaid; that said property was put up at sale and sold to the highest bidder at such sale for the sum of $150,000; that said Francello G. Jillson became the purchaser of said property at said sale, and the sale duly confirmed by this court, the deed executed, the property conveyed to the Toledo, Columbus & Southern Railway Company in good faith, turned over to said last-named company, its bonds issued, and its mortgage executed and recorded, upon which the decree in this case has been taken, and said bonds delivered to the parties entitled thereto and put upon the market and sold, and these answering defendants became the purchasers thereof for full value and are now the owners thereof, all without any notice or knowledge of any claim or pretended claim of the intervening petitioner or any other person, and the said intervening petitioner, if any claim be had, lay still upon the same and made no claim therefor and gave no notice thereof until the said property has become greatly increased in value by reason of betterments made thereto by the parties interested under said purchase and sale and until the business of said railway company had become greatly increased because of the recent developments in the territory through which the same extends; that thereupon the intervening petitioner and others acting with him, incited thereto by certain barratrous persons for purposes of speculation, gave out and pretended that they had some interest or claim therein, not only for claims which they already had, but which they purchased at a small per cent. of their face, and instituted this present proceeding for the purpose of annoying and affecting the real owners of the bonds on said property; that these defendants, acting in
208 perfect good faith and without notice of petitioner's claim or any other claim, invested a large amount of money, expended much time, labor, and material in and about said property and its appurtenances without hindrance from petitioner or his associates and wholly upon the strength of the validity of the said bonds and mortgage and the correctness of the decrees and orders of this court.

And these defendants now have and own the entire issue of the bonds of said railway company to the amount of $825,000, with the interest accruing thereon, except that the defendant The American Finance Company, who has intervened herein, claims to be the owner of 80 of said bonds of $1,000.00 each, which claim is disputed by these defendants and is in issue in this action, but otherwise the ownership and title of these defendants to all of said bonds is undisputed.

That after the decree in the case of the Union Trust Company against the Toledo & Indianapolis Railroad Company, in which case the petitioner was represented by the same counsel he now repre-

sents, he and they, the said petitioner, knowingly abandoned all claim in said property embraced in said decree, and from that time until the filing herein of said intervening petition has permitted that said bonds to be delivered and sold and these defendants to invest their money therein as well as in the improvements of said railway company's property.

Wherefore the said petition- is and ought to be estopped from asserting, if otherwise he had any claim, the same against the said bonds now owned by these defendants or against any stockholder of said Toledo, Columbus & Southern Railway Company;

209 and these defendants deny each and every allegation in said intervening petition not herein expressly admitted and every allegation charged in said intervening petition; without this, that there is any matter, cause, or thing in the said intervening petition complained of material for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is untrue to the knowledge and belief of these defendants, all of which — are ready and willing to aver, maintain, and prove.

And these defendants, herein and now answering likewise the petition of the American Finance Company, filed herein on the 26th day of January, 1887, *denies* that said American Finance Company is a *cestue que trust* of the complainant or is the holder, for value or otherwise, — any of the bonds of said Toledo, Columbus & Southern Railway Company involved in this suit; that said American Finance Company now claims to be the owner of 80 of said bonds, all the others mentioned in said intervening petition of said finance company having been taken up and cancelled under the direction of this court.

And they pray that said American Finance Company may be adjudged not to have any interest in said bonds, but that these defendants as against said finance company may be decreed to be the sole owners thereof, and, inasmuch as said American Finance Company has intervened by its petition asserting its ownership to said bonds and praying for relief therefor, that the question of such ownership may now be tried herein in order that there may be a full and complete adjudication of all of the rights of the parties to this action without delay or multiplicity of suits.

210 STEVENSON BURKE,
CHARLES HICKOX,
By JOHN H. DOYLE,
Their Solicitors.

THE STATE OF OHIO, } *ss:*
Lucas County, }

John H. Doyle, being duly sworn, says that he is the solicitor for defendants, who are now out of this subdivision and county, and affiant says that he believes the above answer and the allegations therein contained to be true, and that most of the matters therein alleged are within his personal knowledge, and those matters other than alleged upon information and belief are true.

JNO. H. DOYLE.

Sworn to before me and subscribed in my presence Oct. —, 1887.

CHAS. T. LEWIS,
Notary Public, Lucas County, O.

211 Afterwards, to wit, on the 19th day of October, A. D. 1887, there was filed in the clerk's office of said court the following replication, to wit:

Replication of Stevenson Burke and Charles Hickox to the Answer of the Complainant to the Intervening Petition of said Burke and Hickox.

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his bill he has already prayed.

DOYLE, SCOTT & LEWIS,
Solicitors for Repliants.

212 Afterwards, to wit, on the 19th day of October, A. D. 1887, there was filed in the clerk's office of said court the following replication, to wit:

Replication of Stevenson Burke and Charles Hickox to the answer of The American Finance Company to the intervening petition of said Burke and Hickox.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

This repliant, saving and reserving unto himself now and at all times hereafter all and all manner of benefit and advantage of excep-

tion which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied to by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by said bill he has already prayed.

DOYLE, SCOTT & LEWIS,
Solicitors for Repliants.

213 Afterwards, to wit, on the 11th day of September, A. D. 1888, there was issued from the clerk's office of said court to the special master commissioner an order of sale, and said order of sale contained a copy of the decree for sale heretofore entered and commanded said special master commissioner to carry into execution said decree as he was therein and thereby commanded and to return the same with a report of his doings to said circuit court of the United States for the northern district of Ohio, western division, within sixty days.

Afterwards, to wit, on the 17th day of October, A. D. 1888, said order of sale was returned and filed in the clerk's office with the following report of the special master commissioner.

214 Afterwards, to wit, on the 17th day of October, A. D. 1888, there was filed in the clerk's office of said court the following report of sale, to wit:

Report of Sale by Special Master W. F. Goodspeed.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and Others, Defendants.

Pursuant to the command of the decree and order of sale issued from the above-named court in the above-entitled cause to me as special master commissioner I caused the railroad and property of the said The Toledo, Columbus & Southern Railway Company, as the same is described in said decrees and order of sale, to be duly advertised for sale at public auction in the Toledo Blade, a newspaper of general circulation and one of the principle daily newspapers printed in the city of Toledo, Ohio, for not less but more than thirty days prior to said sale, the same being published in every daily issue of said paper commencing on the 14 day of September, 1888, and to and including the 16 day of October, 1888, of the time and place of said sale, the sale to take place in the court-room formerly used by said court in the Produce Exchange build-

ing, in the city of Toledo, Ohio, on the 16th day of October, 1888, at the hour of ten o'clock in the forenoon of said day.

That said advertisement contained a concise and pertinent description of said subject-matter to be sold and a statement of
215 the time and place of said sale, with the terms thereof and all needful information to bidders. A true copy of said published notice, together with the proof of such publication, is hereto attached and made a part of this report.

And at the time and place aforesaid I attended for the purpose of conducting such sale, and at the hour named in said notice I proceeded to offer said railroad and the property connected therewith as described in said decree, order, and notice, and having publicly offered said property for sale and announced the same open for bids, and that the lowest bid that would be received would be six hundred thousand dollars, came Stevenson Burke and Charles Hickox and bid for said property the sum of six hundred thousand dollars, and, having received and cried said bid, I kept said sale open for one hour and until the hour of eleven o'clock, and said sum being the only sum bid and being at least the amount fixed in said decree as the amount at which said property could be sold, and said Stevenson Burke and Charles Hickox being the only bidders therefor, I thereupon struck off and sold said property to said Stevenson Burke and Charles Hickox at and for said sum of six hundred thousand dollars, and I now report said sale to them at the price aforesaid, and in pursuance of the orders of the court herein filed I now make said return.

W. F. GOODSPEED,
Special Master Commissioner.

STATE OF OHIO, }
Lucas County, } ss:

W. O. Dakin, being first duly sworn, makes oath and says that he is cashier of the Toledo Blade Company, the publishers of the Toledo Blade; that he personally knows the facts herein stated; that said Toledo Blade is a newspaper printed and of general circulation in said county; that there is published both a daily
216 and weekly edition of said newspaper, and the circulation of the daily in said county of Lucas exceeds that of said weekly, and that the notice of which the annexed is a true copy was published in said Daily Toledo Blade upon each week day of each week for 26 consecutive days, beginning on the 14th day of Sept., A. D. 1888.

W. O. DAKIN.

Subscribed in my presence and sworn to before me this 16th day of Oct., A. D. 1888.

F. T. LANE,
Notary Public, Lucas County, Ohio.

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.
No. 495. Judicial Sale.

By virtue of an order of sale duly issued out of the circuit court of the United States for the northern district of Ohio, western division, and to me directed as special master commissioner, I will offer for sale at public auction, at the court-room formerly used by said court in the Produce Exchange building, in the city of Toledo, Lucas county, Ohio, at ten o'clock a. m. Tuesday, the 16th day of October, 1888, the following-described property, to wit: All and singular the estate and property, real, personal, and mixed, now owned by said The Toledo, Columbus and Southern Railway Company, and all fixtures, rights, privileges, franchises, easements, rights, under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind now acquired by or for the
217 use of said railroad or in connection therewith, including all and singular the lines of railroad of said railroad company known and designated as the Toledo, Columbus and Southern Railway Company, beginning at a point in the city of Toledo, Lucas county, Ohio, and running thence through the counties of Lucas, Wood, and Hancock to the city of Findlay, in said Hancock county, and thence through said city of Findlay and through the county of Hancock to and through the counties of Hardin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs to the town of Belpre, on the Ohio river, and also all and singular the lands, railroads, tracks, superstructure, rail-, laid or unlaid, sidings, turnouts, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, car-houses, freight-houses, warehouses, buildings and repair shops and machine shops, depot grounds and lands secured, provided, or intended for use for that purpose, lands used, procured, or intended for sidings, all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges now belonging or appertaining to or used or procured or designed to be used in connection with said railroad or by it or in the maintenance or operation thereof or any part thereof, and also all of the personal property of every name and nature belonging to said railroad company, including locomotives, tenders, passenger cars, freight cars, baggage cars, and other cars, and all other rolling stock and equipment, and all machinery, tools and implements, rails, chairs, and spikes, and all material whatsoever now owned or possessed by said railroad company for the uses or purposes or designed for use in connection with or for the operation, maintenance,
218 and repair of its lines of railroad or any part thereof or the equipment or appurtenances or which it may be interested in or entitled to, together with all and singular the tene-

ments, hereditaments, and appurtenances of the premises aforesaid or any of them or any part thereof, with all the privileges and appurtenances, rents and profits, reversions, remainders, and all estate, right, title, possession, interest, claim, and demand in law and equity in and to any of the same, meaning hereby all of the property of the said The Toledo, Columbus & Southern Railway Company.

Said property will be sold as an entirety for not less than the sum of six hundred thousand ($600,000) dollars, to the highest bidder, for cash or in the first-mortgage bonds of said company, provided that if payment is made in the first-mortgage bonds of said company at least the sum of one hundred thousand ($100,000) dollars shall be paid in cash on day of sale.

Given under my hand this 14th day of September, 1888.

WILBUR F. GOODSPEED,
Special Master Commissioner.

Toledo, O., Sept. 14, 1888.

219 Afterwards, to wit, on the 15th day of October, A. D. 1888, there was filed in the clerk's office of said court the following motion, to wit:

Motion to Modify Decree.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Now come Stevenson Burke and Charles Hickox, who have heretofore been made parties in this action, and represent to the court that they are the holders of 713 of the first-mortgage bonds secured by the mortgage being foreclosed in this action; that they are also the equitable owners of 80 of said first-mortgage bonds now in the hands of the American Finance Company of New York, a party to this proceeding, which company holds said bonds without any lawful right or title thereto as against these defendants, the true owners thereof; that at the time the sale of the railroad and property in question was ordered there was pending in this court an action in behalf of one McGrath and others to recover sundry claims and indebtedness said to exist against said railway company, amounting to about eighty thousand dollars; that since the decree of sale was made in this case under the authority of the court and by the consent of all the parties the receiver of said railway property
220 has purchased and paid for upon account of said company the entire amount of outstanding claims represented in said last-mentioned action; that there was also in contention an indebtedness of said railway company to the Ohio Central Terminal Company, so called, for rent of terminals in Toledo, several thousand dollars, which alleged indebtedness was secured by the said first-

mortgage bonds of said railway to the amount of twenty-five thousand dollars; that since the rendition of the decree in this case all contentions between the Toledo & Ohio Central Railway Company and said terminal company and between the said Toledo, Columbus and Southern Railway Company and said terminal company have been adjusted and settled, so that said terminal company has agreed to surrender to the receiver the said twenty-five bonds and all the alleged indebtedness secured thereby; that so far as these defendants are advised there are no other claims made in this action or otherwise against said Toledo, Columbus and Southern Railway Company than the first-mortgage bonds, all of which, or substantially all of which, belong to these defendants. In view, therefore, of the present position of the bonds and securities and of the impropriety of tying up in the hands of the clerk or master commisssoner or otherwise a large sum of money during the pendency of the litigation between these defendants and the American Finance Company, these defendants move that the portion of the decree of sale requiring the payment of the purchase-money to the extent of one hundred thousand dollars in cash upon the day of sale in addition to the payment in bonds *to* be abrogated and in its stead that the purchaser may be allowed to pay the purchase-money in bonds, if bonds sufficient to pay the same can be produced, and that, for the security of all persons interested in the decree and in the proceeds of the sale of said
221 premises, the purchasers so paying in bonds may be required to give a bond in the sum of one hundred thousand dollars or such other sum as the court shall direct for the payment of any sum or sums of money promptly to be made to any other person or persons as the court shall hereafter direct, and that such bond shall be made to the approval of the clerk of the circuit court of the United States for the northern district of Ohio, western division, and that the court shall make such other order touching the enforcement of payment of any such indebtedness or obligations as in the judgment of the court will effectually protect the rights of all parties in interest, and that if in the judgment of the court it will be proper for the protection of persons having liens or claims or being interested in the proceeds of the sale of said property to reserve the right to the court to order a resale of said premises that the court shall make such reservation and make such other modification of the order touching the payment of cash in hand as may be just and equitable.

STEVENSON BURKE AND
CHARLES HICKOX,
By BURKE & INGERSOLL, *Att'ys.*

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Stevenson Burke, above named, being duly sworn, says that he is acquainted with all the facts stated in the foregoing motion and believes the same to be true.

STEVENSON BURKE.

Subscribed and sworn to before me by said Stevenson Burke this 13th day of October, 1888.

[SEAL.] ALBERT STRAUS,
Notary Public.

222 Afterwards, to wit, on the 16th day of October, A. D. 1888, there was duly entered on the chancery order book of said court the following order, to wit:

Order Modifying Decree.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY & Others, Defendants.

Upon motion of Stevenson Burke and Charles Hickox, bondholders and defendants in the above action, and it appearing to the court that the facts stated in the motion and application this day presented are true and that due notice of the application and motion to modify the decree and order of sale have been given, it is ordered that if the purchasers of said railroad and property shall pay for the same in bonds, as mentioned in the decree and order of sale, that until the confirmation of the sale by the court and its further order in the premises the purchaser or purchasers shall execute a bond with good and sufficient sureties, to the satisfaction of the clerk of this court, that he or they will pay all sums of money ordered by the court to be paid from the proceeds of the sale of said railroad and other property ordered and decreed to be sold, and that such purchaser or purchasers shall comply with all orders and decrees of this court made or hereafter to be made in regard to the disposition of the proceeds of the purchase-money or price of said prop-
223 erty so decreed and ordered to be sold; that such bonds shall, until the further order of the court, take the place of and supersede the necessity of the cash payment of $100,000 ordered to be made at the time of sale.

The court reserves the right and power to modify or abrogate this order at any time and to require the payment of such part of the purchase price of said property to be paid in cash *or* shall be just and equitable, and the court reserves the right and power to make all such further and other orders in the premises as may be just and equitable, and the court also reserves the right to order a resale of said railroad property in case of non-compliance by the purchaser to comply with its orders hereafter to be made in regard to the distribution of the proceeds of sale or otherwise.

October 15, 1888.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

224 Afterwards, to wit, on the 18th day of October, A. D. 1888, there was filed in the clerk's office of said court the following motion, to wit:

Motion to Set Aside Sale, etc.

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants. } No. 495.

Motion to set aside sale and prevent the confirmation thereof.

And now comes R. N. Hazard, the American Finance Company, Mary E. Short, Eliza M. Church, Mary E. Goodwin, Oscar H. Short, William Lief, said American Finance Company being a corporation of the State of Pennsylvania and doing business in the city, county, and State of New York, and said other persons above named being residents of said city of New York, and object to and protest against the confirmation of the sale of the property of the Toledo, Columbus and Southern Railway Company by Wilbur F. Goodspeed, special master commissioner, under order of this court, which sale was made to Stevenson Burke on the 16th day of October, 1888, said sale being made under the notice and of the property described in said notice, a copy of which is attached hereto and to which reference is hereby made, on the ground that said sale is illegal and inequitable for the reasons set forth in the notice hereto attached, which was read at the time when and place where said property was so offered for sale and a copy thereof handed to said Stevenson Burke before said property was struck off and sold to him, said Burke.

225 And upon said grounds and for said reason said persons now respectfully ask that said sale be set aside and held for nought.

R. N. HAZARD,
AMERICAN FINANCE CO.,
MARY E. SHORT,
ELIZA M. CHURCH,
MARY E. GOODWIN,
OSCAR H. SHORT,
WM. LIEF,
By JOEL W. TYLER,
Their Solicitor and Attorney.

TOLEDO, O., *Oct.* 16, 1888—10 o'clock a. m.

To all persons or any person who proposes to bid for the property advertised for sale at this place and time under the notice hereto attached, the property in said notice described as being the railroad and property of the Toledo, Columbus & Southern R'y Co., and also to all and any parties interested in said sale and property:

You are hereby notified that the undersigned owners and holders of a large amount of the bonds and stock of said company now protest against and forbid the sale of said property for the following reasons, to wit:

First. That said property is incorrectly described upon which the bonds of said company should have and have a lien as se-
226 curity for the payment of the same, a whole county being left out in said description.

Second. That no legal notice, as required by the mortgage and the law, has been given and published prior to this sale.

Third. That no appraisement has been made of that part of said property which is real estate, among which is the railroad bed and superstructure, sidings and buildings, and lands owned by said Co., and upon which there is a lien of said mortgage or trust deed, as the law requires.

Fourth. That said property is to be sold as an entirety—real and personal property together.

Fifth. On account of the order as to the payment in the bonds of the company and all the provisions of the notice and order connected therewith, the same being illegal and inequitable.

Sixth. Because of various other errors appearing in the decree ordering this sale and said notice so published.

And further notice is hereby given that any sale will be held and regarded as a nullity by the undersigned, and application will be made to the proper court praying that said sale shall be regarded as illegal and a nullity and that the same may be set aside and not confirmed.

R. N. HAZARD, *Of N. Y. City,*
By J. W. TYLER, *His Att'y.*
AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*
MARY E. SHORT,
ELIZA M. CHURCH,
MARY E. GOODWIN,
OSCAR H. SHORT,
WM. LIFE,
By J. C. SHORT, *Agent.*

227 United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

No. 495. Judicial Sale.

By virtue of an order of sale duly issued out of the circuit court of the United States for the western division of the northern district of Ohio, and to me directed as special master commissioner, I will offer for sale at public auction, at the court-room formerly used by said court in the Produce Exchange building in the city of Toledo, Lucas county, Ohio, at 10 a. m. Tuesday, the 16th day of October, 1888, the following-described property, to wit: All and singular the estate and property, real, personal, and mixed, now owned by said The Toledo, Columbus & Southern Railway Company, and all fixtures, rights, privileges, franchises, easements, rights under leases, terms and parts of terms, agreements, covenants, and contracts of all and every kind now acquired by or for the use of said railroad or in connection therewith, including all and singular the lines of railroad of said railroad company known and designated as the Toledo, Columbus & Southern Railway Company, beginning at a point in the city of Toledo, Lucas county, Ohio, and running thence through the counties of Lucas, Wood, and Hancock to the city of Findlay, in said Hancock county, and thence through said city of Findlay and through the county of Hancock to and through the counties of Hardin, Logan, Union, Fairfield, Perry, Hocking, Vinton, Athens, Morgan, Washington, and Meigs to the town of Belpre, on the Ohio river; and also all and singular the lands, railroads,
228 tracks, superstructure, rails laid or unlaid, sidings, turn-outs, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station-houses, car-houses, freight-houses, warehouses, buildings and repair shops and machine shops, depot grounds and lands secured, provided, or intended for use for that purpose, lands used, procured, or intended for sidings; all buildings, structures, erections, improvements, leases and leasehold interests, contracts, choses in action, easements, and privileges now belonging or appertaining to or used or procured or designed to be used in connection with said railroad or by it or in the maintenance or operation thereof or any part thereof; and also all of the personal property of every name and nature belonging to said railroad company, including locomotives, tenders, passenger cars, freight cars, baggage cars, and other cars, and all other rolling stock and equipment, and all machinery, tools, and implements, rails, chairs, and spikes, and all material whatsoever now owned or possessed by said railroad company for the uses or purposes or designed for use in connection with or for the operation, maintenance, and repair of its lines of railroad or any part thereof or the equipment or appurtenances or which it may be interested in or entitled to, together with all and

singular the tenements, hereditaments, and appurtenances of the premises aforesaid, or any of them or any part thereof, with all the privileges and appurtenances, rents and profits, reversions, remainders, and all estate, right, title, possession, interest, claim, and demand in law and equity in and to any of the same, meaning hereby all of the property of the said The Toledo, Columbus & Southern Railway Company.

Said property will be sold as an entirety for not less than the sum of six hundred thousand ($600,000) dollars to the highest bidder for cash, or in the first-mortgage bonds of said company, pro-
229 vided that if payment is made in the first-mortgage bonds of said company at least the sum of one hundred thousand ($100,000) dollars shall be paid in cash on day of sale.

Given under my hand this 14th day of September, 1888.

WILBUR F. GOODSPEED,
Special Master Commissioner.

Toledo, O., Sept. 14th, 1888.

230 Afterwards, to wit, on the 24th day of October, A. D. 1888, there was filed in the clerk's office of said court the following intervening petition, to wit:

Intervening Petition of Stevenson Burke and Charles Hickox.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

Now comes Stevenson Burke and Charles Hickox and by leave of the court first obtained filed this their intervening petition herein. They say that the American Finance Company, a defendant herein, claims to be the owner of eighty of the bonds described in the original bill of complaint herein and secured by the deed of trust in said bill of complaint set forth and therein sought to be foreclosed. The said American Finance Company came into possession of said eighty bonds under and by virtue of two certain articles of agreement, copies of which are attached to and made part of the answer of said American Finance Company to the former intervening petition of these complainants filed in this cause, to which copies of said agreements as set forth in said answer reference is here made for a greater certainty and a more full exhibit thereof, and said finance company claims the ownership of said eighty bonds as commissions for the negotiation of eight hundred bonds de-
231 scribed in said agreements and have no other claim thereto.

These complainants further say that said American Finance Company never negotiated said eight hundred bonds in said agree-

ments referred to and never earned said eighty bonds by the negotiation or sale of said eight hundred bonds, or any portion of them, or in any other manner, and said American Finance Company never had nor now has any right or interest in the ownership of said eighty bonds.

These complainants further say that they are the owners of said eighty bonds so as aforesaid claimed by said American Finance Company and are entitled to the possession of the same. Wherefore these complainants pray that in the distribution of the fund arising from the sale of the property securing said bonds by this court they may be adjudged the owners of said bonds, and that their rights as such may be fully protected, and for such other and further relief as may be deemed just and equitable.

STEVENSON BURKE,
CHARLES HICKOX,
By DOYLE, SCOTT & LEWIS, *Solicitors.*

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Stevenson Burke, being duly sworn, says that he has read the foregoing petition and knows the contents thereof; that those matters therein alleged as upon information and belief affiant believes to be true, and all other matters therein alleged are true.

STEVENSON BURKE.

Sworn to before me and subscribed in my presence this 12th day of Oct., 1888.

[SEAL.] ALBERT STRAUS,
Notary Public, Cuyahoga County, Ohio.

232 Afterwards, to wit, on the 9th day of November, A. D. 1888, there was filed in the clerk's office of said court the following answer, to wit:

Answer to Objection, Protest, and Motion of Roland N. Hazzard, the American Finance Company, et al.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

And now comes Stevenson Burke and Charles Hickox, and for answer to the objections and protest made to the confirmation of the sale hereinbefore made of the Toledo, Columbus and Southern railway property by Wilbur F. Goodspeed, special master commissioner, and to the motion to set aside said sale, which objection, protest, and motion are made by Roland N. Hazzard, the American Finance Company, Mary E. Short, Eliza M. Church, Mary E. Goodwin, Oscar H. Short, and William Lief, say that they admit that said American Finance Company is a corporation of the State of Penn-

sylvania and doing business in the city, county, and State of New York, and that the other persons above named are residents of said city of New York. They further admit that the sale was made to said Stevenson Burke as in said objection, protest, and motion set forth, and admit that the notice attached to and made part of said objection, protest, and motion was read at said sale and a copy thereof handed to said Stevenson Burke at said sale before said property was struck off and sold to said Burke.

233 But said Stevenson Burke and Charles Hickox deny that said Roland N. Hazzard, the American Finance Company, Mary E. Short, Eliza M. Church, Mary E. Goodwin, Oscar H. Short, and William Lief or either of them at the time of said sale or since were or are the owners in any amounts of the bonds or stocks of said Toledo, Columbus & Southern Railway Company or had any right or interest in either said bonds or said stock. The said Stevenson Burke and Charles Hickox, further answering, say—

That the said American Finance Company has heretofore claimed to be the owner of eighty (80) of the bonds described in the original bill of complaint herein and secured by the deed of trust in said bill of complaint set forth and there sought to be foreclosed. The said American Finance Company came into the possession of said eighty (80) bonds under and by virtue of two certain articles of agreement, copies of which are attached to and made part of the answer of said American Finance Company to the intervening petition of said Stevenson Burke and Charles Hickox, heretofore filed in this cause, to which copies of said agreements as set forth in said answer reference is here made for further certainty and a more full exhibit thereof, and said American Finance Company claimed the ownership of said eighty (80) bonds as commission for the negotiation of the eight hundred (800) bonds described in said agreements, and have not now and never had any other claim thereto.

Said Burke and Hickox, further answering, say that said American Finance Company never negotiated said eight hundred (800) bonds in said agreements referred to, and never earned said eighty

234 (80) bonds by the negotiation or sale of said eight hundred (800) bonds or any portion of them, and never in any manner acquired or had or now have any ownership, right, or interest in said eighty (80) bonds or other bonds of said Toledo, Columbus and Southern Railway Company.

That said Burke and Hickox, further answering, say that they are the owners of said eighty (80) bonds so as aforesaid claimed by said American Finance Company and are entitled to the possession of the same.

And the said Burke and Hickox, further answering, say from information and belief that if the said Roland N. Hazzard, Mary E. Short, Eliza M. Church, Mary E. Goodwin, Oscar H. Short, and William Lief or either of them have possession or control of any of the bonds of said Toledo, Columbus and Southern Railway Company that they are portions of said eighty (80) bonds above referred to, and that whatever possession or control they have was obtained from

said American Finance Company, claiming ownership for commissions as aforesaid, with full knowledge of the rights of said Burke and Hickox in the premises, and that they nor either of them have any right or interest in said (80) bonds or other bonds of said Toledo, Columbus and Southern Railway Company; said Burke and Hickox deny that any property described in the trust deed securing said bonds was omitted from the description of said property in the advertisement of sale; they deny that any of the legal requirements of the mortgage or trust deed have not been complied with in said advertisement and sale; they admit that no appraisement was made of any of said property for said sale; they admit
235 that said property was sold as an entirety, real and personal property together, and deny that there was anything illegal or inequitable in the terms of sale, and deny that there were any errors in the decree or order of sale.

Wherefore said Stevenson Burke and Charles Hickox pray that said Roland N. Hazzard, the American Finance Company, Mary E. Short, Eliza M. Church, Mary E. Goodwin, and William Lief may be required to come into this court and file with the court the bonds claimed to be owned by them and fully set up their title and ownership of the bonds and stock claimed by them; that the same may be decreed null and void; that said Burke and Hickox may be decreed the true owners thereof and their rights as such owners fully protected; also that said sale may be confirmed and proper conveyance ordered to be made to said Burke, the purchaser at said sale, and for such other and further relief as may be deemed just and equitable in the premises.

THE STATE OF OHIO, }
Cuyahoga County, } *ss:*

Stevenson Burke, being duly sworn, says that he has read the foregoing answer and knows the contents thereof; that those matters therein alleged as upon information and belief affiant believes to be true and all other matters therein alleged are true.

STEVENSON BURKE.

Sworn to before me and subscribed in my presence this 6th day of November, 1888.

[SEAL.] ALBERT STRAUS,
Notary Public, Cuyahoga County, Ohio.

236 Afterwards, to wit, on the 5th day of January, A. D. 1889, there was filed in the clerk's office of said court the following notice, to wit:

Notice of Motion.

U. S. Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

SIRS: Please take notice that the undersigned will, on the records in the said cause and on all the proceedings therein had, including the decree, move the circuit court to be held in the city of Toledo, in the State of Ohio, on the 5th day of January next, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order striking off from the files of the court a certain petition purporting to be verified by Stevenson Burke on the 12th day of October and to be filed by leave of said court, and to revoke, annul, and set aside the order by which such petition purports to be so filed, and also for a stay of all the proceedings under said petition, including the taking of testimony thereunder, on the ground that said court has no jurisdiction of the subject-matter of the said petition in the above-entitled suit, and because the said petition and the proceedings thereon are contrary to the practice and procedure
237 of this honorable court and in derogation of the rights of the persons sought to be proceeded against *in invitum* under said petition, and for such other, further, complete, and final relief as may then seem meet and proper in the premises.

Yours, &c., ROBERT LUDLOW FOWLER,
Solicitor for American Finance Company.

Dec. 13th, 1888.

To Messrs. Doyle, Scott & Lewis, attorneys for defendants.
To A. J. Ricks, Esq., master *pro hac vice.*

On the back of said notice is the following, to wit:

NORTHERN DISTRICT OF OHIO, *ss:*

On the 27th day of December, 1888, at Toledo, Ohio, I made due service of the within order by delivering a copy thereof to Doyle, Scott & Lewis, attorneys.

B. F. WADE, *U. S. Marshal,*
By JOHN J. HACKETT, *Deputy.*

238 Afterwards, to wit, on the 4th day of February, A. D. 1889, there was duly entered on the journal of said court the following order to wit:

Confirmation of Sale, &c.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*

This day came on to be heard the motion of Rowland N. Hazard, the American Finance Company, Mary E. Short, Eliza M. Church, Mary E. Goodwin, Oscar H. Short, and William Life, heretofore, on the 18th day of October, 1888, filed herein, to set aside the sale heretofore made by the special master commissioner under the decree of sale heretofore rendered in this cause, and thereupon came the said parties, by their attorneys, and the trustee, the complainant, the defendant railway company, and Stevenson Burke and Charles Hickox, by their respective attorneys, and said motion was duly submitted and argued to the court, and the court, being now fully advised in the premises, do overrule and deny said motion.

And thereupon there was submitted to the court the return of Wilbur F. Goodspeed, special master commissioner, of the sale by him made under a former order and decree of this court, and, the court on careful examination of the proceedings of the said special master commissioner *and* being satisfied that the same had been in all respects in conformity to law and the orders of this court, it is hereby ordered that the said proceedings and sale be, and the same are hereby, confirmed and approved, and that the said special master commissioner be, and he is hereby, ordered and directed to make a deed of
239 the premises so sold, being all of the property, real and personal, rights, franchises, privileges, and appurtenances of every kind and description owned by the said The Toledo, Columbus and Southern Railway Company and described in the decree heretofore rendered in this cause and in the decretal order issued to said special master commissioner, to the purchasers thereof, Stevenson Burke and Charles Hickox, as hereafter provided.

And it being made further to appear to the court that there are certain bonds secured by the mortgage foreclosed in this action the ownership and title to which are in dispute herein, it is ordered that the special master, A. J. Ricks, to whom all the matters in issue have been heretofore referred, shall proceed without delay to take testimony upon the issues thus presented and to report the same to this court at as early a day as practicable as to the ownership of such bonds and all other matters relating to the distribution of the purchase-money in issue in this cause and referred to him as aforesaid; but the taking of said testimony shall be without prejudice to the rights of the American Finance Company to submit and have the adjudication of the court upon the motion by it filed on the 29th day of December, 1888, and the notice of said motion filed the 5th day of January, 1889.

And it being made further to appear to the court that the said bonds so involved in said controversy will be entitled to the proportion of the purchase-money to which the said bonds bears to the

whole number of bonds issued as heretofore found in the decree in this case, it is ordered that the purchaser immediately upon the determination of the ownership of said bonds shall pay to the clerk of this court for the benefit of the person found entitled
240 thereto the full amount of the distributive share of the proceeds of said sale belonging to such owner or owners of said distributed bonds; and the court reserves the right, if such payment be not made, upon the order of the court to that effect, to set aside this order of confirmation and direct the resale of said property for the payment of said amount or amounts.

It is further ordered that the special master commissioner, Wilbur F. Goodspeed, upon the surrender to him for cancellation of the bonds owned and controlled by the purchasers, to wit, seven hundred and thirteen of the eight hundred and twenty-five thousand ($825,000) dollars of bonds heretofore found to have been issued and secured by said mortgage, and of the costs of this action, taxed at $—, the said Wilbur F. Goodspeed forthwith make to said purchaser a good and sufficient deed of all of the property so sold and to put the purchaser in possession thereof; and upon said deed being executed it is further ordered that James M. Ferris, receiver heretofore appointed in this action, forthwith turn over to the said purchaser all of the said property now in his possession as such receiver. It is further ordered that the costs of the motion to set aside the sale filed by said Hazzard and others be paid by them respectively within ten (10) days of the entry of this order, or in default thereof that execution issue therefor; and to said orders so made the said Rowland N. Hazard and others, the parties moving to set aside said sale, except, and said parties so moving to set aside said sale also pray an appeal from the orders aforesaid, which is allowed upon said parties giving a bond for the costs thereof, which shall not operate as a supersedeas or stay of the execution of said orders or any part
241 thereof, in the sum of five hundred dollars to the approval of the clerk of this court, but if said parties or any of them shall desire or move for a stay or supersedeas the court will determine the same and the amount of bond to be given therefor by further order herein.

(Signed) HOWELL E. JACKSON,
Circuit Judge.

242 Afterwards, to wit, on the 15th day of February, A. D. 1889, there was filed in the clerk's office of said court the following motion, to wit:

Motion to Set Aside Sale.

AMERICAN LOAN AND TRUST COMPANY
against
TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO., &c.

To the honorable circuit court of the United States for the western district of Ohio, northern division:

The undersigned respectfully represent to your honorable body that they are the holders and owners of the first-mortgage bonds of the Toledo, Columbus and Southern Railway Company for the respective amounts in dollars set opposite their respective signatures attached hereto; that they are informed that a sale of said property has been had and that the same has been confirmed, but that such sale and confirmation were had without sufficient notice or the notice prescribed in the mortgage, the same requiring sixty days' notice of sale, whereas the said road was sold on a notice of only thirty days; that the said railway company's property was worth, as your petitioners are informed and verily believe, at least $1,200,000, but the said road was sold for only $600,000; that if the said sale is allowed to stand the undersigned bondholders, your petitioners, must lose from 25 to 30 per cent. of the amount of their respective bond-holdings; that they are informed and believe that if a resale is ordered and the notice prescribed in the mortgage be given that the said property will realize sufficient to satisfy the entire amount of bonds owned by your petitioners, based on the present value of the property.

243 Wherefore your petitioners pray that the said confirmation and sale may be set aside and that a resale of said property may be duly ordered.

AMERICAN FINANCE CO., 50 bonds,
By J. C. SHORT, *Pt.*
J. C. SHORT, 13 bonds.
F. A. WHITE, 1 bond.
M. D. STUART, 2 bonds,
INGLIS STUART, *Att'y.*
MARY E. SHORT, 3 bonds;
M. E. GOODWIN, 5 bonds;
W. LIFE, 3 bonds;
O. H. SHORT, 1 bond;
E. M. CHURCH, 2 bonds,
By J. C. SHORT, *Agent.*
R. N. HAZARD, 20 bonds.
J. M. ASHLEY, 7 bonds,
By R. N. HAZARD.

244 U. S. Circuit Court.

AMERICAN LOAN AND TRUST COMPANY
vs.
TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Rowland N. Hazard, being duly sworn, says that he is a resident of the city of New York; that he is one of the bondholders of the Toledo, Columbus and Southern Railroad Company; that deponent is informed and believes that said railroad has been sold at foreclosure sale for $600,000; that the said railroad property is, as deponent verily believes, worth at least $1,200,000; that if a resale of the said railroad property is ordered deponent will either bid at least $700,000 therefor or else he will procure responsible parties, satisfactory to the court, who will make such bid; that this deponent will give a bond in such form and for such amount and with such sureties as this court may approve, conditioned that if a resale be ordered that there shall be bid for or realized on a resale of said railroad $700,000, or else that such proper penalty as the court may see fit, in such proper form as they may choose, shall be enforced under said bond; that if the present sale be allowed to stand this deponent will only realize from 65 to 70 % on the dollar of his bonds, and nothing whatever on the stock of the said railroad company which this deponent holds and owns, $22,500 par value of; that deponent believes that if a resale be ordered the said property will bring much more than $700,000; that deponent is worth at least the sum of $500,000 over and above his debts and liabili-
245 ties, and that deponent will, if the court so order, join in the making of the said bond or procure other or satisfactory parties, as the court may direct, to execute or give said bond; that, as deponent is informed and believes, the decree under which said sale was made does not provide that all the bondholders shall be allowed to participate in any plan of reorganization, as it should according to the practice in such case; and therefore deponent prays that the said decree may be so amended or the said sale set aside and a resale ordered, for if the present sale is allowed to stand it will work a great injustice and much loss and damage to this deponent and the other outstanding bondholders.

R. N. HAZARD.

Sworn to before me this 14th day of February, 1889.

[SEAL.]

A. H. GLEASON,
Notary Public, N. Y. Co.

246 U. S. Circuit Court.

AMERICAN LOAN AND TRUST COMPANY
against
TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Moses R. Crow, being duly sworn, says that he has read the affidavit of Rowland N. Hazard, verified this 14th day of February, 1889, and that deponent believes the same to be true; that deponent is familiar with most of the facts stated by the said Hazard in his said affidavit that the said railroad property, as deponent verily believes, is worth at least $1,200,000; that if a resale thereof be ordered deponent will bid at least $700,000 therefor, and that deponent will join in giving a bond that if a resale be ordered the said property shall bring said sum of $700,000, and that deponent is worth, as deponent verily believes, $200,000 over his liabilities; that if the sale as now made is allowed to stand it will work a great injustice to the outstanding bondholders, and that if a resale be ordered deponent will give or cause to be given, with such sureties as the court may direct, a bond in such form and of such character as the court may require that the said property will bring at least $700,000 at said resale.

MOSES R. CROW.

Sworn to before me this 14th day of Feb., 1889.
A. H. GLEASON,
[SEAL.] *Notary Public, N. Y. Co.*

247 U. S. Circuit Court.

AMERICAN LOAN & TRUST COMPANY
ag'st
TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

CITY & COUNTY OF NEW YORK, *ss:*

John C. Short, being duly sworn, says that he is the president of the American Finance Company; that he is acquainted with Stevenson Burke and is apprised of the claim made by said Burke that the American Finance Company has no title to any stock or bonds of the Toledo, Columbus & Southern railway, for the alleged reason that said finance company did not negotiate as required under the contract between that company and T. P. Brown; that said claim of said Burke is incorrect and untrue, the fact being that the said American Finance Company did negotiate about $900,000 of the bonds of said railway company in pursuance of its contract with said Brown, and had about completed the negotiations for the money required to extend said road from Findlay to Columbus, and would have completed the same within the time provided in the contract between said Brown and the said American Finance Company but for the illegal and unwarranted acts of

said Brown and said Burke, and said Brown and Burke ever since the purchase by said Burke of the notes and bonds therein referred to of Mason and Jillson have refused and still refuse to allow the said American Finance Company to complete and carry through said negotiations to its great damage, and in order to prevent the said American Finance Company from so negotiating the said Brown and Burke, through the said Brown, commenced an action in the United States court for the southern district of New York to restrain the said American Finance Company from dis-
248 posing of the bonds it had received under the said contract, which said suit has been decided in favor of the said finance company.

That deponent has for many years been negotiating and handling railroads and railroad properties; that he is familiar with the railroad and property and plant of the Toledo, Columbus & Southern railway from Toledo to Findlay, Ohio; that he has been over the said property and examined it carefully; that deponent is familiar with the value, cost, and present actual value of the said property and plant; that the same is to-day and was at the time of the sale under the foreclosure proceedings worth the sum of at least $1,200,000, as deponent verily believes; that judged by its earning capacity, as shown by the reports of the receiver of the net earnings of said road, deponent would place the value of said property at $1,500,000, and that said property is increasing in value; that the sale of the said property under the foreclosure proceedings for the sum of $600,000 is inequitable and unjust; that deponent is the owner and holder of thirteen of the first-mortgage bonds of $1,000 each of the said Toledo, Columbus & Southern Railway Company; that the American Finance Company is the owner and holder of fifty bonds, and is entitled to nine more bonds of the railway company, which are still in the treasury of the said railway company; that if the said sale shall stand it will result in a loss on a distribution of the proceeds as against the bonds outstanding of about 25 to 30 per cent. on the total value of the bonds held by this deponent and the American Finance Company.

That the said sale of the said road was made without the notice and advertisement as required by the mortgage, the same
249 requiring at least sixty days' notice, and deponent depended upon the fact that at least sixty days' notice would be given; that deponent did not have any proper opportunity to prepare for and bid at said sale; that if said opportunity had been offered deponent would have been prepared and willing to bid at least $700,000; that the said property should be sold for not less than $700,000, and deponent believes that it will bring, on a resale, the full par value of all the bonds now outstanding upon the said property, which said bonds are held and owned as follows: 94 thereof by the American Finance Company, deponent and associates; 27 thereof by R. N. Hazard and his associates, and 713 thereof by said Burke and his associates.

That the bonds of the said Stevenson Burke were acquired under the contracts of April 14 and September 24, 1884, copies of which

contracts are hereto annexed, made part of this affidavit, and marked "Exhibits A and B" respectively; that the American Finance Company was prevented by said Brown and said Burke from carrying out and completing said contracts, and that the title of said Burke to the bonds he now holds was obtained by paying off the notes and lien held by Mason and Jillson under said contracts and receiving from them the bonds and notes mentioned in said contracts which had been negotiated by the said American Finance Company and deponent thereunder with said Mason and Jillson; that the foreclosure proceedings since the acquirement of the said bonds in the manner aforesaid by said Burke has been prosecuted in the interest of the said Burke or at the instigation of said Burke, and that the title of said Burke was acquired from Mason and Jillson under and in pursuance of a contract dated the 16th day of December, 1886, a copy of which is hereto annexed, marked "Exhibit C," and made part of this affidavit; that under the said contract between
250 Mason and Jillson and the said Burke and Hickox the said Burke should have preserved the rights and equities of the said American Finance Company and deponent both in the bonds and stock of the said railway company, which has not been done; that if said railway company's property should be sold for its real value it should, in addition to paying the bonds in full, realize a good dividend on the stock; that deponent believes that it would be inequitable to allow the said sale as made to stand, and that a resale of the said property should be ordered or the decree or order herein amended so as to allow all the bondholders, including this deponent and the said American Finance Company, to participate in the said purchase by said Burke and in any organization or reorganization of the said railway property which may be made, provided they desire so to do.

JOHN C. SHORT.

Sworn to before me this 14th day of February, 1889.
[SEAL.] I. M. DITTENDERFER,
Notary Public, N. Y. Co.

251 "EXHIBIT A."

Articles of agreement, made and entered into on the 14th day of April, A. D. 1884, by and between Theophilus P. Brown, of the city of Toledo, in the State of Ohio, party of the first part, and the American Finance Company, a corporation doing business in the city of New York, party of the second part, witnesseth:

Whereas, the said party of the first part is the owner of all the stock, except a nominal amount, and all of the first-mortgage bonds ($800,000) of the Toledo & Indianapolis Railway Company, which said bonds are now held in hypothecation by various persons and corporations to secure the payment of certain obligations of said railway company, or said party of the first part; and

Whereas, the railway of said company extending from the city of Toledo aforesaid to the city of Findlay, in the State of Ohio, about

forty-one miles, is now in the hands of and is being operated by a receiver; and

Whereas, there are sundry lien claims outstanding against said railway company and claims for right of way, labor and materials not secured by collateral; and

Whereas, said party of the first part is desirous of obtaining a loan or loans, as hereinafter mentioned, for the purpose of retiring said existing claims and obligations, and is also desirous of making provision for the extension of said line of railway from Findlay aforesaid to the city of Columbus and to some point in the Hocking valley in the vicinity of Straitsville in said State and to Union City or other point on the C. C. C. & I. R. R.; and in furtherance
252 of his said plans, has applied to said party of the second part for its services, assistance and facilities in obtaining means with which to discharge said existing claims and obligations and to extend the line of said railway, as above mentioned; and said party of the second part has consented to render such services upon the terms and conditions hereinafter expressed:

Now, therefore, it is hereby agreed by and between the parties hereto, in consideration of the premises and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, as follows:

Article I.

Said party of the first part agrees to sell and transfer the said stock and bonds and all the property and franchises of said Toledo & Indianapolis Railway Company to a new company to be organized by said party of the second part, under the laws of the State of Ohio, upon the terms and conditions hereinafter expressed, and to cooperate with said party of the second part in all proper ways in bringing about the consummation of the purposes of this agreement.

Article II.

Said party of the second part agrees to proceed without unnecessary delay upon the execution of this agreement to the organization of said new railroad company, to be called the "Toledo, Columbus & Indianapolis Railroad Company," and to the procuring of the engraving of the bonds and stock for the same, and of a settlement of the outstanding claims secured by the pledge of bonds as aforesaid, and to the procuring of a loan of, say, $300,000 to $400,000 in money, as may be deemed practicable, to be made upon the pledge of said present outstanding bonds of said Toledo & Indianapolis Railway Company or upon
253 the bonds to a like amount of the proposed new railroad company, as may be found convenient, the cash proceeds arising from such loan to be used in extending said Toledo & Indianapolis railway to a connection with the I. B. & W. R. R. at Findlay and in taking up such of said claims as are liens prior to the mortgage made to secure said bonds, and to the settlement of all other claims, secured and unsecured—the payments on account

of such settlements to be made in such manner as may be agreed upon between said party of the first — and the lender or lenders and to be done in such a way as to extinguish all the outstanding claims against said railway company and its property.

Such loans when made are to be secured by the promissory note of said party of the first part, with said bonds at not more than fifty cents to the dollar as collateral security.

Article III.

As soon as practicable after the organization of said new railroad company, provision is to be made by it for the issue of its stock and bonds, the same to be used in the purchase of the stock, bonds and property of said Toledo & Indianapolis Railway Company, and in the payment of said claims and obligations, and in extending said railway as above mentioned and equipping the same, it being understood that the stock of said new railroad company shall be fixed at $25,000 per mile and the bonds at $20,000 per mile, for each mile in length of railroad built and to be built and equipped, and that the bonds are to have forty years to run, bearing interest at 6 per cent. per annum, payable semi-annually, in New York, and be secured by a first mortgage on all the rights, property and franchises of such new corporation.

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Article IV.

It is understood and agreed that the stock of said new railroad company to the amount of $25,000 per mile and its first-mortgage bonds to the amount of $20,000 per mile, or the net proceeds of said bonds, are to be paid for the stock, bonds and property of said Toledo & Indianapolis Railway Company, and that the remainder of the bonds and forty-five per cent. of the stock to be issued by said new railroad company are to be negotiated and the proceeds thereof are to be appropriated to the construction and equipment of the remainder of the line from Findlay to Columbus and the Hocking valley, and to Union City or other point as aforesaid.

Article V.

Said party of the second part also agrees to undertake the negotiation of the entire issue of the bonds and forty-five per cent. of the stock of said new railroad company for the money, means and credit necessary to retire the said securities of said Toledo & Indianapolis Railway Company, and to take up the secured and unsecured claims against the property of said last-mentioned railway company, and to extend the line of said railway from Findlay aforesaid to Columbus and Hocking valley and Union City or other points aforesaid.

Article VI.

There is to be allotted and paid to said party of the second part, in consideration of the premises, a commission or compensation of two and one-half per centum on the amount of money raised by said

party of the second part for said party of the first part by way of loans or by means of the settlement of the claims and obligations, such commission or compensation to be payable at such time as the money received from such loan or loans shall be paid over to said party of the first part by said party of the second part, or as the existing
255 obligations secured by the pledge of bonds as collateral shall be taken up, and as said liens and other claims shall be paid by said party of the second part, it being understood that the commissions mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about, as a result of this agreement. But it is understood and agreed that if and so far as the loan of money shall be obtained, said party of the first part is to have the right of causing the purchase of such claims and liens upon such terms as he may be able to make with the holders thereof, and that whatever discount is saved in such purchase, shall inure to the benefit of said party of the first part.

Article VII.

It is also understood and agreed that said party of the second part shall have the right to negotiate the sale of the said $800,000 of bonds of said Toledo & Indianapolis Railway Company in effecting the settlement of said claims, or for any other purpose which shall be approved by the said party of the first part, and is also to have the right to negotiate all the bonds and forty-five per cent. of the stock to be issued by said new railroad company for any of the purposes expressed in this agreement. But none of said bonds issued by either company are to be negotiated, sold or otherwise disposed of at less than ninety cents on the dollar and accrued interest without the consent of said party of the first part.

Article VIII.

Said party of the second part is to have the right to negotiate a settlement with the parties in Chicago representing the rolling mill company and holding $401,000 of said bonds as collateral for a given sum of money due to said rolling mill company or
256 its assigns and to use therefor bonds and stock of said new railroad company at not less than the rate herein fixed.

Article IX.

Said party of the second part is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by said railroad company and negotiated; said ten per centum on said bonds being payable in said bonds at par, or in the net cash proceeds of sales thereof, at its option, and on said stock in said stock at par; such payments or deliveries to be made from time to time *pro rata* as any of said bonds shall be negotiated, sold or exchanged for outstanding liabilities or for property, labor and materials required by said railroad companies or either of them, or otherwise used or disposed of.

Article X.

In addition to the said ten per centum of stock hereinbefore agreed to be paid to said party of the second part as commission, there is to be appropriated and transferred to said party of the second part, as hereinbefore mentioned, in further consideration of the premises and of its undertakings to secure the marketing of said bonds, the forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered to said party of the second part *pro rata*, from time to time, as said bonds or any of them shall be negotiated or otherwise disposed of, as provided in the paragraph last above written; but the total of said ten per centum commission on stock and bonds shall not exceed ten per centum of the amount issued for each mile of road in the name of the new railroad company.

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Article XI.

It is further agreed and understood that whenever the stock, bonds and property of said Toledo & Indianapolis Railway Company shall be turned over to said new railroad company to be organized as above provided, the said party of the first part is to be thereupon elected president of said new railroad company and is to have forty-five per cent. of the stock of said new railroad company and the naming of a majority of the board of directors of said new railroad company, the minority thereof to be named by the party of the second part.

Article XII.

It is further agreed and understood that the work of making the connection between the present southern terminus of said Toledo & Indianapolis railway in the city of Findlay aforesaid and said I. B. & W. R. R. is to be supervised and conducted by said party of the first part, and is to be paid for out of the cash proceeds of the loan or loans herein first above referred to.

Article XIII.

It is also understood and agreed that the proceedings now pending in the United States court for the foreclosure of the mortgage given to secure said $800,000 of bonds of said Toledo & Indianapolis Railway Company, shall be prosecuted to completion, unless all the outstanding liabilities of said Toledo & Indianapolis Railway Company shall be paid and discharged and the road left free to its stockholders, to be turned over to said new railroad company in such a manner as to make the title to said new railroad company in said Toledo & Indianapolis property complete, free and clear. But said party of the first part is to use all proper means in his power to hasten or retard said foreclosure, as the said party of the second part
258 may deem to be in the interest of its proposed negotiations; and when and if said sale shall take place under said foreclosure, said party of the second part shall have the right, at its

election, to cause said property to be purchased by said new railroad company at such foreclosure sale, in accordance with the purpose of this agreement.

Article XIV.

It is hereby mutually agreed and understood by and between the parties hereto that if the loan is not obtained in time to pay off the present debts of the said Toledo & Indianapolis Railway — (excepting its first-mortgage bonds) before said railway is sold at judicial sale, or the money provided with which to purchase the said railway at said judicial sale, the said railway shall not be so purchased by the said party of the second part, as hereinbefore provided, that this contract shall be null and void, and no compensation or commissions or expenses of any kind shall be claimed by the said party of the second part; and when said loan is obtained of sufficient amount to pay off said claims, or said railway shall be purchased at said judicial sale, as hereinbefore provided, it is agreed that unless said party of the second part shall raise money, means or credit necessary for the extension of said railroad to Columbus, Ohio, or other point to be agreed upon by the parties hereto, within one year from the date of procuring the said loan, or from the date of the purchase of said railway, then and in that case this contract for negotiating the securities of or on said extension may, at the option of said party of the first part, become null and void.

Article XV.

The trust company which shall act as trustee of the mort-
259 gage securing the bonds of the new railroad company, shall be selected by the concurrence of the parties hereto, and shall be from those now located in the city of New York; and all bonds, except those relating to the line from Findlay to Toledo, shall remain in the custody of said trust company until drawn out by agreement of the parties hereto. Said party of the second part hereby agrees to advance for said new railroad company all expenses of organizing it and for engraving its bonds and stock, and is to have such engraving done in such a manner as will make them eligible to be listed on the New York stock exchange; and it is also agreed that if said party of the first part procures the loan on the present bonds of the Toledo & Indianapolis Railway Company, no commission shall be claimed for the same by the said party of the second part.

It is further agreed and understood that if said party of the second part shall find it necessary in conducting said negotiations to give or agree to give a majority of the stock of said new railroad company to the purchasers of said bonds, then and in that case a sufficient contribution is to be made by said party of the second part from its stock commissions herein provided for to make such majority. But in case the securities of said new company so to be organized by said party of the second part, in pursuance of this agreement, shall be used in the purchase of the bonds, stock or property of said Toledo & Indianapolis Railway Company, and said extension

shall not be made, then and in that case said party of the first part is to have a majority of said stock; and also that it is the intention of this agreement that if the proper amount of the securities of said new railroad company shall in any manner be utilized or used in acquiring said Toledo & Indianapolis Company's securities
260 or property, said party of the second part is to be paid its commissions as hereinbefore fixed.

In testimony whereof, said party of the first part has hereunto subscribed his name, and said party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary, on the day and year first above written.

T. P. BROWN.
[SEAL.] AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*

Attest: WM. P. WATSON, *Secretary.*

261 "EXHIBIT B."

Tripartite agreement made and entered into on the 24th day of September, A. D. 1884, by and between Theophilus P. Brown of the city of Toledo, in the State of Ohio, party of the first part; the American Finance Company, party of the second part, and Israel B. Mason of Providence, and Francello G. Jillson of Woonsocket, in the State of Rhode Island, parties of the third part, witnesseth:

That whereas, an agreement was entered into under date of April 14th, 1884, by and between said parties of the first and second parts (copies of which are held by each of the parties hereto) in relation, among other things, to the negotiations undertaken by said party of the second part for said party of the first part, of the notes of said party of the first part to the amount of $325,000, and also to the negotiations of $800,000 of the stock and $800,000 of the first-mortgage bonds of said Toledo & Indianapolis Railway Co.* and said party of the second part has requested said parties of the third part to take said notes on behalf of themselves and associates, and said parties of the third part have consented thereto, upon and subject to the terms and conditions herein expressed, and subject to the consummation of all the details to the satisfaction of all the parties hereto.

It is therefore hereby agreed by and between the parties hereto, that said terms and conditions are and shall be as follows:

1. Said Brown is to make, endorse and deliver his several promissory notes in approved form and denominations, payable to his own order within two years from this date, with interest at six per cent. per annum from date, said interest to be payable semi-
262 annually, and said notes to be accompanied by first-mortgage bonds of said Toledo & Indianapolis Railway Co., at the rate of fifty cents on the dollar as collateral security—said bonds bearing coupons maturing April 1, 1885,—all past-due coupons

and those maturing October 1, 1884, being first taken off and cancelled.

2. The net proceeds of said loan are to be applied to the purchase and taking up of the present outstanding claims against said T. & I. Railway Co. and its property, secured and unsecured (including the purchase by said Brown of the interest of Patrick Dowling, contractor, in said railway), and to the payment of the expenses incident thereto; and also to the building of an extension of said railway from its present southern terminus to a connection with the Indiana, Bloomington & Western and the Lake Erie & Western railroads at Findlay, O.; and also to the payment of the balance due on rolling stock heretofore purchased by said Toledo & Indianapolis Railway Company.

3. All the outstanding claims so purchased and taken up as aforesaid by the use of the proceeds of said loan are to be, so far as practicable, assigned in blank or to said American Finance Company, in trust, as may be found advisable, and are to be delivered to said American Finance Co., to be held by it in trust as follows:

When all the claims not secured by said first-mortgage bonds as collateral shall have been purchased and taken up, the same are to be forthwith cancelled; but this stipulation shall not prevent the cancellation at any time of any portion of said claims not secured by bonds as collateral, whenever said first and third parties may agree to such cancellations, and all claims secured by bonds as collateral which shall be so purchased and taken up, are to be assigned and delivered to said American Finance Co. in trust, for the common use, benefit and protection of all holders of said first-mortgage bonds. And when said loan shall be paid, or sooner if the parties hereto shall agree, said claims so secured are to be cancelled.

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4. If any of the proceeds of said loan shall remain after the purchase and delivery of said claims as above provided, such residue shall be then paid over to said Brown.

5. All the $800,000 full-paid stock of said Toledo & Indianapolis Railway Co. (except a nominal amount thereof held by the directors for qualification) is also to be issued and deposited with said American Finance Co. and is to be disposed of as follows:

Upon the payment of said loan, or in case of default of such payment, there is to be issued and delivered by said trustee to said parties of the third part, $360,000 of said stock; to said Brown $408,000 thereof, and to said American Finance Co. $32,000 thereof, the same to be issued in the names of said parties respectively.

6. A bonus of ten per cent. on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of such purchase, in the first-mortgage bonds of said Toledo & Indianapolis Railway Co. at par.

7. Upon the purchase, assignment and delivery of the claims secured by the pledge of first-mortgage bonds, such action shall be taken in relation to the receivership, taking judgment on such claims or the entering of a decree of foreclosure, or the dismissal of the suit of the Union Trust Co. of New York, trustee, now pending as the

parties hereto may deem best, it being understood that upon
264 the request of the holders of said notes, said Brown, acting as president of said Toledo & Indianapolis Railway Co. is to forward or retard all legal proceedings now pending or such as may be hereafter commenced, as the holders of said notes may deem advisable.

8. The net proceeds of said notes are to be deposited in such bank or trust Co. as the said Mason and Jillson, and said American Finance Co. may designate; such deposit to be made for the credit and account of said "American Finance Co.," in trust for disbursement by it for the purposes hereinabove expressed.

9. All the remainder of said $800,000 of first-mortgage bonds of said Toledo & Indianapolis Railway Co. over and above the $650,000 of the same, pledged to secure the payment of said $325,000 of said notes, are hereby appropriated as follows: 1. To the purchasers of said notes their said bonus, amounting to $65,000 thereof, to be distributed among them *pro rata*, according to their respective holdings of said notes. 2. To said American Finance Co. $80,000 thereof, in full payment of all its claims for commission for negotiating said $800,000 of said bonds. 3. To said Brown $5,000 thereof; such appropriations and the delivery of said bonds to be made from time to time *pro rata*, as said notes are disposed of.

10. It is also further agreed and understood that when the proposed new railroad company contemplated, and provided for in said agreement between said first and second parties hereinabove referred to, shall have been organized, and shall issue its bonds and stock for the purchase of the bonds and stock of said Toledo & Indianapolis Railway Co. to a like amount now outstanding, and for extending said railway to Columbus, O., and said purchase shall be consummated, said Brown is to receive all the excess
265 of bonds and stock so to be issued in payment for said T. & I. railway, which shall be issuable by said new railroad Co. at the rate of $20,000 per mile of each (bonds and stock) for all the road which shall be in operation from the tracks of the I. B. & W. and the L. E. & W. railroads at Findlay, O., to Toledo, O., after providing for said outstanding stock and bonds of said T. & I. railway Co., it being understood that the road now in operation is about forty miles in length, and that when said connection or extension at Findlay is completed, there will be over forty-one miles in length, upon which bonds and stock of the new railroad company are to be issued at the rate of $20,000 per mile of each.

11. In consideration of the personal services of said Mason and Jillson in the examination of said Toledo & Indianapolis railway, and of the responsibility assumed by them as endorsers and in bringing their associates into the loan, it is agreed that when the $650,000 of bonds pledged as collateral as aforesaid are sold, and said loan is paid, and said Brown is entitled to receive the excess over and above the payment of said loan, said Mason and Jillson are to receive $50,000 of said bonds, or the proceeds of the sale thereof, to their own personal use.

12. It is agreed that until said loan is paid, all the net earnings

of said Toledo & Indianapolis Railway Co. from the time of its completion to a connection with said I. B. & W. and said L. E. & W. railroads, are to be applied as follows:

1. To the payment of the interest on said notes. 2. To the payment of the interest on said remaining $150,000 of bonds; and 3. to the payment of interest on said $650,000 of said bonds.

But it is also agreed and understood that in case such net earnings, when so applied, shall not be sufficient to pay such in-
266 terest and coupons from the date of the making of the connection with said railroad last above named to the maturity of said loan, that no default is to be taken or declared on said coupons maturing prior to the maturity of said loan, and no proceedings at law shall be taken against said Toledo & Indianapolis Railway Co. to enforce the payment of the same; but this provision shall not be construed to prevent such proceedings from being commenced and prosecuted at any time subsequent to the maturity of said loan, nor to abate to any extent the amount of interest and coupons so to be paid.

In testimony whereof the several parties hereto have subscribed this agreement on the day and year first above written.

T. P. BROWN,
AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*
I. B. MASON.
FRANCELLO G. JILLSON.

267 "EXHIBIT C."

Whereas, Israel B. Mason and "Francekki" G. Jillson, of Providence, Rhode Island, hold and own all the promissory notes of Theophilus P. Brown, of Toledo, Ohio, mentioned and referred to in a certain contract between said Mason and Jillson, said Brown, and the American Finance Company, dated September 24th, 1884, (a copy of which is hereto attached), excepting one of said notes for the sum of ten thousand dollars ($10,000)—the principal of which said notes so held and owned by said Mason and Jillson amounts, in the aggregate, to the sum of three hundred and fifteen thousand dollars, the interest upon which has been paid up to September 24th, 1885, leaving due and unpaid upon said notes held and owned by said Mason and Jillson three hundred and fifteen thousand dollars ($315,000) with interest at the rate of six per centum per annum, payable semi-annually from September 24th, 1885:

And whereas, said Mason and Jillson hold six hundred and thirty of the first-mortgage bonds of the Toledo, Columbus & Southern Railway Company as collateral security to said promissory notes, and also hold and own sixty-three other of the said first-mortgage bonds of said railway company, referred to in said contract as bonus bonds—each of said first-mortgage bonds being for one thousand dollars, together with the coupons maturing on and after January 1st, 1886:

Now, the said Mason and Jillson, the first party, in consideration

of the payments, covenants and agreements hereinafter stated of Stevenson Burke and Charles Hickox, of Cleveland, Ohio, the second party, do hereby agree to sell and deliver unto said second party,
without any recourse upon said first party or either of them
268 in any event whatsoever, the said notes of Theophilus P. Brown, the principal of which amounts to three hundred and fifteen thousand dollars as aforesaid, and also all their right, title and interest in said six hundred and thirty collateral first-mortgage bonds and said sixty-three bonus first-mortgage bonds:

In consideration whereof the said second party have this day paid upon the amount of the principal of said notes, the sum of ninety thousand dollars ($90,000) the receipt whereof is hereby acknowledged, and do hereby assume and agree and promise to pay to said first party, at the Chemical National bank, New York, within one year from this date, the amount of the balance of the principal of said notes, to wit: two hundred and twenty-five thousand dollars ($225,000) and also on the 24th of March, 1887, at the office of the Rhode Island Hospital Trust Company of Providence, Rhode Island, all the past-due interest upon said notes, together with all the interest that shall accrue upon said notes up to and including said 24th day of March, 1887, with said sum of ninety thousand dollars this day paid upon said notes and credited as of this date; and until the said balance of said principal of said notes is paid, said second party further agrees to pay to said first party interest at the rate of six per centum per annum, payable semi-annually from said March 24th, 1887, at said trust company on said sum of two hundred and twenty-five thousand dollars, the balance of said principal of said notes as aforesaid; and as an additional consideration said second party have this day paid to said first party the further sum of ten thousand dollars, the receipt of which is hereby acknowledged.

In case said second party elect to pay the remainder of said principal of said notes before the expiration of said one year, they shall
give ten days' notice thereof to said first party.

269 It is further hereby agreed between said parties that either of said parties may at any time elect to declare the principal sum of said six hundred and ninety-three first-mortgage bonds to be due and payable, in accordance with the mortgage or deed of trust made by said railway company to secure the payment of the same; but in the event that a sale is had of the railroad and property of said Toledo, Columbus and Southern Railway Company before the full payment of the residue of the principal and interest of said notes as hereinbefore provided, the said second party are to and hereby agree to substitute, at least ten days before said railroad and property may be offered for sale, other collateral security sufficient to secure the principal and interest of said notes then remaining unpaid to the satisfaction of said first party.

In the event of the failure of said second party to promptly pay any of the sums of money hereinabove provided to be paid to said first party by said second party, or to substitute other collateral securities to the satisfaction of said first party as hereinabove provided, then the said first party shall forthwith have all the rights

and remedies as to said mortgage bonds entitling and enabling them to take any step or steps or proceeding to secure or enforce or obtain the payment of their remaining debt which at any time prior to this contract they had in or with respect to said bonds, as well as the right to enforce the aforesaid personal promise and obligation of said second party to pay and discharge said remaining debt.

It is further agreed that the said second party will to the extent they can do so, cause the suit of the American Loan and Trust Company now pending against said railway company in the circuit court of the United States for the western division of the northern
270 district of Ohio, to be prosecuted to final decree, and a sale of said railroad made thereunder and will indemnify and save harmless the said first party against the costs and expenses thereof, excepting the counsel fees of the solicitors of record for said complainants up to this date, viz.: S. A. Bowman and R. A. Harrison, which fees up to this date are to be paid by said first party.

Upon the payment of the principal and interest of said notes in full by said second party the said first party are to deliver the said notes and the said bonds held by them to said second party and also to surrender and release all their rights and interests of every kind whatsoever (including all their interest in the capital stock of said company) under the contract of September 24th, 1884, aforesaid, to said second party.

And the said Theophilus P. Brown hereby assents to the foregoing agreement between said first party and said second party—the same having been entered into at his request. It is further agreed that upon said full payment of the principal and interest of said notes by said second party, the said first party will also direct said American Finance Company so far as the first party have any authority to do so, to cancel any claims which were purchased and taken up as provided in sections 2 (two) and 3 (three) of said contract dated September 24th 1884.

It is further agreed that no interest is to be computed upon the said installments of interest which became due and payable respectively on said March 24th, 1885, and September 24th, 1886.

In witness whereof we have hereunto set our hands this
271 16th day of December, A. D. 1886: this agreement being executed in duplicate.

ISRAEL B. MASON,
FRANCELLO G. JILLSON,
By RICHARD A. HARRISON AND
S. A. BOWMAN, *Their Attorneys.*
STEVENSON BURKE.
CHARLES HICKOX.
THEOPHILUS P. BROWN.

We, the said Israel B. Mason and Francello G. Jillson, do hereby confirm the foregoing contract, at Providence, Rhode Island, this 20th day of December, A. D. 1886.

ISRAEL B. MASON.
FRANCELLO G. JILLSON.

272 Afterwards, to wit, on the 26th day of February, A. D. 1889, there was filed in the clerk's office of said court the following affidavit, to wit:

Affidavit of John H. Doyle.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY. } Affidavit.

THE STATE OF OHIO, }
Lucas County, } *ss:*

John H. Doyle, being duly sworn, says that he has been the general counsel of the Toledo, Columbus and Southern Railway Company since its organization, having prepared the certificate of incorporation and the necessary papers to the organization and completion of said corporation; that he knows John C. Short, F. A. White, R. N. Hazard, and J. M. Ashley; that during all of the time since the organization of the defendant company the said John C. Short has been the president of the American Finance Company; that until recently and during the same period Francis A. White has been the vice-president of the same company and was during the year 1885 the president of the Toledo, Columbus and Southern Railway Company; that R. N. Hazard was, until some period within the last year, the president of the complainant; that during all the period covered by the litigation in this case one Robert L. Fowler was the attorney for the American Finance Company and the attorney of record for said company in this cause; that the records in this cause will show that up to December, 1886, the
273 solicitors of record for the complainant were Messrs. R. A. Harrison, of Columbus, and S. A. Bowman, of Springfield, and that while they commenced this action in the name of the complainant they were acting with and in concert with the attorney for the American Finance Company, and were paid, as shown by the agreement attached to the affidavits of the movers in this motion, by Mason and Jillson, who also acted in concert with the American Finance Company; that in taking the testimony in New York in this action said Fowler, Bowman and Harrison all appeared upon the same side and for the same purpose, and that said Fowler has continuously acted and appeared for the American Finance Com-

pany and said Short and White; that when the cause was ready to be submitted to this court for a decree, at the June term, 1887, the said Robert L. Fowler was personally present and represented, as shown by the records of this cause and the pleadings filed by him in behalf of the American Finance Company, all of the bonds not in the possession of Burke and Hickox except those now claimed by said R. N. Hazard; that when said cause was submitted to the court at said June term, 1887, affiant prepared a decree to be entered in this cause, as the attorney for said Burke and Hickox, the owner of said bonds and attorney for said railroad; that said form of decree was submitted to said Fowler for examination and the same was by him kept for several days for that purpose; that said decree as then prepared is that which the court finally entered in the cause, with certain amendments and changes suggested by said Fowler, and submitted to the court and passed upon by the court at his request.

That one of the points submitted by said Fowler was the price at which said court should order as the lowest price at which said property should be sold, said Fowler insisting that the court should fix the minimum bid at the sum of six hundred thousand
274 dollars ($600,000), and which was ordered by the court upon the motion and suggestion of said Fowler; that the time of advertising the said property for sale by the special master as it now stands, and as it ever has been, was in said decree at the time it was submitted to said Fowler, and was fixed by the court without any objection from said Fowler; that another matter which was fixed by the court at the request of said Fowler was that the property should not be sold until after 90 days from the date of rendering said decree, which was a time longer than that provided for in said decree as prepared, but was fixed at that period upon the motion and request of said Fowler; that said decree was entered at said June term, 1887, and has remained unexecuted by the sale of the property until October, 1888, without any effort or any offer being made by any of the persons now claiming to represent said bonds to either pay the said decree or to provide any means for its payment or any part thereof.

That when the decretal order was issued to the special master for the sale of the property the sale was advertised, as shown by the master's report, every day in the Toledo Blade, which is a newspaper of very large circulation, for thirty-two (32) days; that at the time of the sale said John C. Short was personally present with Mr. Tyler, who then acted as the attorney for said John C. Short and the others whose names are attached to the notice and motion served and filed by him, and which were before the court at the time of the hearing for the confirmation of the sale; that at the request of said Mr. Tyler, who was in constant consultation with said Short, the said sale was kept open, as shown by said return, at their request, the said Tyler giving as a reason for the request that
275 they were in communication with persons in New York and were waiting telegraphic instructions as to whether they wanted to bid upon the property or not; that no bid having been made, except that of the said Burke and Hickox, after the delay

asked for had been granted, said property was struck off and sold, as shown by said return.

Affiant further says that, as shown by the intervening petition of Burke and Hickox in the exhibit thereto attached, it will be seen and the fact is that said R. N. Hazard, who now claims to own twenty of said bonds, while he was acting as president of the complainant, the trustee, commenced a suit in his own name in the court of common pleas of Lucas county just a few hours before the annual election for officers and directors for said railroad company to enjoin the stockholders from voting at said election, and, without a dollar of stock appearing in his name or in the name of the persons who acted with him on that day, appeared at the office of the railway company and attempted by force to obtain the possession and control of said defendant corporation, and in their purpose had to be resisted with force; that said Hazard, if he ever obtained any bonds or had any or any interest in said property, did so while he was president of the trustee, the complainant, and while as such trustee — was his duty to act in absolute fairness and indifference between all the parties in interest in this litigation and obtained pending this suit; that at the said meeting and in the controversy, so far as it has come under affiant's notice, the said Hazard, as now — in this motion, appeared to be acting in concert with said John C. Short and said American Finance Company.

That affiant has read the affidavit of said Rowland N. Hazzard, and, being cognizant of every fact connected with the stock
276 and bonds of said company, he says he does not know of any plan of reorganization existing between any of the bondholders or any practice such as has been spoken of in said affidavit; that the purchasers at said sale will organize a corporation for its management is no doubt true, but the purchase was without any agreement or arrangement between the bondholders for any reorganization; that affiant has no knowledge of any examination of the property having ever been made by said Hazard and Moses R. Crow, whose affidavit is also attached, and does not show that they made no such examination, and have no knowledge as to the value of said property, because they do not state or claim that they ever did examine or have any present or personal knowledge on the subject.

Affiant has also read the affidavit of John C. Short, and, having been fully cognizant of all the facts, is able to state, of his own knowledge, that the only right or claim which said American Finance Company or the other movers to said motion have to the eighty bonds in question arises under the claim that they earned them as commission for the sale of the $800,000 of bonds under the provisions of the contracts attached to said affidavits, and have no other right or claim to them and have paid no other consideration therefor; that the possession of said bonds was obtained by said finance company under and by virtue of the provisions of said agreements, and, as affiant believes, that possession was obtained by said finance company in no other way, and that it has simply retained that possession, refusing to surrender or deliver said bonds

to any one; that the said American Finance Company was notified in writing by said Brown, such writing being prepared by this affiant after the expiration of the time in which the bonds were to be negotiated and sold by said finance company, and after
277 they had failed for the time named to make any such negotiation that he terminated and declared void that part of said contract as provided in article 14 of the said contract of April 14th, 1884, a copy of which notice is attached hereto; that at that time none of said bonds had been negotiated; that the only pretense that affiant ever heard of any negotiation of any bonds was that the eight hundred bonds of the Toledo and Indianapolis Railway Company provided for in section one of the tripartite agreement of September 24th, 1884, were cancelled by the sale of said property, and upon the reorganization after the sale of the property of the Toledo and Indianapolis Railway Company and its reorganization under the name of the Toledo, Columbus and Southern Railway Company the bonds of the latter company were substituted for the bonds of the former company as a security for the loan of three hundred and twenty-five thousand dollars ($325,000) provided for in said tripartite agreement and in compliance with the other provisions thereof; that the sale of said Toledo and Indianapolis railroad and its reorganization was with the consent and at the instigation of said American Finance Company, Short, White, and said Mason and Jillson, and said reorganization was principally managed by affiant under their direction, and was done, as affiant always understood, under the provisions of said tripartite agreement, and especially section seven (7) and ten (10) of said tripartite agreement, and the bonds of the new company were placed in the place and stead of the bonds of the old company, purely and simply, as affiant always understood, as a security, precisely as the bonds of the old Toledo and Indianapolis Company were to have been placed in the event that no sale had taken place in the case of the Union Trust Company against the said Toledo and Indianapolis Railway Company.

278 And affiant says that the bonds of the old T. & I. Company were, in the presence of W. F. Goodspeed, special master, and Francis A. White, then acting vice-president of the finance company and the agent for all the parties in the East having an interest in the property and affiant, burned in the building then occupied by this court and under the orders of this court, consented to by all the parties, and the new bonds to the same amount, to wit, $800,000, were issued, as affiant has stated, in their place and stead and for no other purpose within the knowledge of affiant, who was in a position, as he believes, to know all or substantially all that occurred in that respect after the sale of the old T. & I. road.

And affiant further says that the said Robert L. Fowler, after the decree was rendered in said cause, as will be shown by the files and records in said cause, frequently appeared as representative of the said American Finance Company, filing pleadings and motions on behalf of said company, and especially on the 13th of September, 1887, obtained, with the consent of said Burke and Hickox, an order

for the payment to said American Finance Company by the receiver certain notes which it claimed to hold with others, in the sum of $9,000, which order was signed by said American Finance Company, by said R. L. Fowler, its solicitor, and that said Fowler, as attorney for said finance company, has been, as affiant believes, fully cognizant and conversant with all the proceedings in this cause at their respective stages and personally appeared at the hearing during the year 1888, before A. J. Ricks as master, in the case of the intervening petition of Jeremiah C. King and others and participated in the said hearing and was in Toledo for several days and has
279 been in Toledo in connection with the business being transacted in this cause a number of times since said decree was rendered.

Affiant also says that all of the bonds purporting to be held by the movers of this motion, except the 27 claimed by R. N. Hazzard for himself and J. M. Ashley, are the same eighty bonds which in all the proceedings in this case have been referred to as the eighty bonds claimed by the American Finance Company as commission under said agreements, copies of which are attached to affidavit of Short, herein filed; that in the testimony heretofore taken in this cause it was claimed that certain of said bonds had been divided, in the way of dividends, between the stockholders of said American Finance Company, the names of such stockholders being unknown to affiant, but in the testimony heretofore taken and on page 339 of the printed book, which was used as an exhibit in the hearing before the master in this case, marked Exhibit Number 17, is what was produced by the American Finance Company, by its president, John C. Short, as a resolution authorizing such dividend; and affiant has never known of any other claim being made by any person to said bonds than such claim as they had under the contract aforesaid and the fact that they obtained them by virtue of their membership in said American Finance Company. Affiant says that the statement in the affidavit of Short that the American Finance Company did negotiate about $900,000 of the bonds of said railway company in pursuance of the contract with said Brown is untrue in every respect; that but $825,000 of bonds were ever authorized to be issued by the board of directors of said railway company, $800,000 of the original issue and $25,000 to be for an extension to the L. B. & W. crossing at Findlay, Ohio, as provided in said contract; that Short being president
280 of the finance company, White its vice-president, and also president of the railway company, and White's son being made secretary of the railway company, and Hazzard president of the trust company, in violation of the provisions of the resolution of the railway company authorizing said bonds and mortgage, they procured the trustee to certify to 200 additional bonds without any authority from the board of directors or stockholders; that 89 of these bonds had been by these men pledged to various parties, some to the finance company, some to White, some to his son, and some to other persons, for alleged debts against the company. A part of these are the bonds spoken of in the order already mentioned for

the payment of $9,000 of notes of the finance company and White, but the said bonds have all been taken up by the receiver under the orders of the court and are not now outstanding obligations of the company and never were negotiated in any sense of the word, but were principally taken by these men as alleged security for the debts which they claimed to hold against the railway company, which debts are now all paid. But 825 bonds are now outstanding claimed by any one.

Affiant does not know whether Short relied upon the sixty days' notice of said sale being given, but does know that his attorney knew that the decree provided for thirty days' notice at the time the decree was entered; that not only the ninety days' expired after said decree was entered, as provided by the decree before any order of the sale was issued, and, in addition thereto, more than one year without any effort or offer on the part of Mr. Short or anybody else provided for any means for paying said decree or purchasing said property or doing anything else in the premises; that said
281 Burke and Hickox purchased the interest of Mason and Jillson and the interest of said T. P. Brown in said bonds and stocks and railroad property, and thereby became the owner, as affiant believes, of said eighty bonds; but the fact of such purchase was known to the finance company and Short long before said decree was entered.

That, as shown by the files and records in this cause, said Burke and Hickox have always disputed the ownership of any of said eighty bonds by any of the parties to said motion; that the title to the same have been in issue in this case for a long time, and that said movers have never yet, to the affiant's knowledge, attempted to make any proof herein of their ownership or title.

And affiant also says that from the date of the sale in October, at which Short was personally present and all the other parties present by their attorney, as shown by the notice then served, and motion to set aside the sale then filed up to the 4th day of February, when said motion was heard at Toledo, a period of over three months, said parties made no effort, to affiant's knowledge, and do not claim in their affidavits to have made any effort to either pay said decree or to make any provision therefor or to raise said bid or to take any other steps in the case, except such as were taken in the presence of the court in the presentation of said motion.

Affiant further says that the 25 bonds over and above the original 800, which 25 bonds were issued for a mile and a quarter extension in the city of Findlay to an extension with the L. B. & W. railroad, were owned by said T. P. Brown, who made said extension, and were sent to said American Finance Company for negotiation or for security for a loan to raise money to pay interest
282 due from said Brown to Mason & Jillson on the $325,000 loan, and not — did said finance company fail to do either, but was about to allow Brown's interest to be forfeited for non-payment, when affiant had to make other arrangements for the money to pay said interest, and affiant's information was at that time and his belief now is that said American Finance Company could not and had

not the means "*are*" standing to negotiate said bonds or any of them.

Affiant says that the 2½ per cent. commission provided in article 6 of said agreement of April 14, 1884, on the amount of money borrowed by said Brown was paid to said American Finance Company in cash on the 1st day of November, 1884, to wit, the sum of $8,125.00.

JOHN H. DOYLE.

Sworn to before me and subscribed in my presence February 25, 1889.

WM. A. MILLS,
[SEAL.] *Notary Public, Lucas County, Ohio.*

283 TOLEDO, OHIO, *March* 10, 1886.

To the American Finance Company, New York city.

DEAR SIRS: You are hereby notified that, more than one year having expired from the event and date named therein, and you having failed to perform or carry out the same as therein provided, and for the reason that you have violated the same and failed and refused to comply with the same, all power, authority, or right to make any sale, negotiation, transfer, or contract for the sale of any bonds, stocks, or other securities named in our contracts of April 14th and Sept. 24, 1884, are hereby revoked, and I hereby elect under the provisions thereof to treat and declare the same void.

T. P. BROWN.

284 Afterwards, to wit, on the 4th day of March, A. D. 1889, there was duly entered on the chancery order book of said court the following order, to wit:

Order Postponing Time of Hearing of Motion to Set Aside Sale, etc.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY CO. *et al.*, Defendants.

This 1st day of March, 1889, this cause came on before the Hon. Howell E. Jackson on the motion of Roland N. Hazard, the American Finance Company, J. C. Short, E. A. White, M. D. Stuart, Mary E. Short, M. E. Goodwin, W. Life, O. H. Short, E. M. Church, and J. M. Ashley to set aside the sale of the property made in this cause and the confirmation thereof, said motion having been heretofore filed in this cause, on the 15th day of Feb. ult., and notice of which was duly given, and having been continued from the 28th Feb. to this day; whereupon, upon consent of parties on both sides by counsel, the petitioners being represented by D. C. Briggs, Esqr., and Messrs. Pilcher and Weaver, and the purchasers of said property and said defendants being represented by the Hon. S. Burke, it is ordered by the court that the hearing of said motion be continued

until the 19th day of March, 1889, at the city of Cleveland, Ohio, without prejudice of any kind to any of the rights of the parties to this cause; and it is further ordered by the court, upon such consent, that the rights of all parties shall remain *in statu quo*, and shall on said 19th day of March or until the hearing of this
285 motion be and remain just what they are now; and it is further ordered, on such consent, that the said petitioners be, and they are hereby, restrained and enjoined from making any disposition of any part of the bonds and stock claimed by them in this cause, and that the purchasers of said property and all other parties to the litigation be enjoined and restrained from disposing of the property purchased heretofore in this cause and from taking any other step that may prejudice or change the rights of petitioners as they now stand. It is further ordered, upon such consent, that petitioners shall present on or before the 10th day of March, 1889, such affidavits, documents, and other proof as they may desire to use in aid of their said petition, and that copies thereof shall be served upon the defendants in said petition or their attorneys on or before said day of filing, and that the defendants and said purchasers have leave to reply to such affidavits, documents, and other proof by serving on petitioners or their attorneys, Messrs. Swayne, Swayne and Hayes, of Toledo, Ohio, such replying affidavits, documents, or proof as they may be advised on on before the 16th day of March, 1889, and that the said petitioners may read upon the hearing of this petition any other additional affidavits or documents that they shall be advised may be necessary in reply to any new facts or allegations alleged and set forth in said replying affidavits, documents, or proof; said additional affidavits, etc., to be filed on or before the hearing on the morning of the 19th.

Approved.

HOWELL E. JACKSON,
Circuit Judge.

286 Afterwards, to wit, on the 7th day of March, A. D. 1889, there was filed in the clerk's office of said court the answer of American Finance Co. to second intervening petition of Burke and Hickox, as follows, to wit:

U. S. Circuit Court, Northern Dist. Ohio, W. Div.

THE AMERICAN LOAN & TRUST COMPANY, Complainant,
against
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.
} In Equity.

The answer of the American Finance Company to the second intervening petition of Stevenson Burke and Charles Hickox, intervenors.

The said American Finance Company, now and at all times saving to itself all and all manner of benefit or advantage of excep-

tion or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said intervening petition contained, being unlawfully compelled to make answer thereto, for such answer thereto or to so much thereof as this respondent is advised it is material or necessary for it to make answer thereto, answering, saith:

First.

That said second intervening petition was filed after the decree rendered in this above-entitled suit without leave of this court, and the said petition has no reference to any affirmative matters
287 adjudged in the above-entitled suit; that the subject-matter of said petition does not grow out of any contention presented by the original pleadings in said suit and is not referred to in the decree entered in the above-entitled suit, and therefore ought to be the subject of an independent suit or action, according to the practice in such cases made and provided.

That this court has no power or authority or jurisdiction to determine the controversy alleged and presented in said second intervening petition after decree in the said above-entitled suit, and there is no power or authority in the said court to refer said second petition to a master to hear the same and to report the testimony taken thereon with his findings of fact and of law.

That all such proceedings before said master are unlawful and contrary to the rules and practice of this court sitting in chancery, and the same are an invasion of this respondent's right to an orderly and independent trial according to law.

Second.

That said Stevenson Burke and Charles Hickox are not the owners of the eighty bonds referred to in their said petition and have no manner of right to intermeddle therewith; that said Burke and Hickox never possessed the said bonds and never lawfully acquired any right therein or thereto as against this respondent, which, until the time hereinafter stated, alone lawfully owned the same and was entitled to all the rights and remedies incident to the ownership of such eighty bonds.

Third.

That heretofore and before the filing of said second petition this respondent sold, pledged, assigned, transferred, and set over to various persons and corporations for value the said eighty
288 bonds, and said transferees and assignees and not respondents are now the lawful holders and owners of said bonds and entitled to share in the distribution of the proceeds of sale of the property mortgaged to secure the payment of said bonds, and this respondent's right to so sell, assign, and transfer the same cannot be litigated or adjudicated in this suit by the proceedings instituted by said second petition of Burke and Hickox and improperly entitled and taken in the above-entitled suit.

Fourth.

That the said unlawful petition of Burke and Hickox is a part of a conspiracy of said Burke and Hickox, their agents and privies, to deprive said American Finance Company of its just profits intended to be secured to it in the following venture.

That prior to the 14th day of April, in the year 1884, a certain line of railway from Toledo to Findlay, Ohio, was existing, then operated and owned by the Toledo and Indianapolis Railway Company; that the bonds and stock of said company were then capitalized at $800,000, stated in the par value of first-mortgage bonds, and $800,000 of common stock, but said stock was unissued except 7 shares; that all said bonds and stock were represented to respondent to be then owned by one Theophilus P. Brown, the president of said Toledo and Indianapolis Railway Company, although said Brown never paid anything of value therefor.

That all of said bonds were then hypothecated for construction debts of said railway and said stock was worthless; that said corporation was grossly insolvent and the said Brown was a bankrupt, without money, means, or credit to take up said bonds; that the line of railway of said Toledo and Indianapolis Railway Company was in a deplorable condition and in the hands of a
289 receiver appointed in a suit to foreclose the mortgage securing said 800 bonds.

That said Brown in 1884 applied to respondent for financial assistance to reorganize the said railway and pay its indebtedness, and thereupon respondent procured to be made the agreement, a copy of which is annexed hereto as Exhibit A.

That pursuant to its undertakings respondent procured the agreement, Exhibit B, hereto annexed, to be entered into, and in the proper performance of both such agreements this respondent, among other things, caused said Toledo, Columbus and Southern Railway Company to be formed in Ohio, to acquire and take over the said railway property and all the debts of said Toledo and Indianapolis Railway Company to be paid. By reason thereof this respondent became entitled to have as its share of the profits eighty bonds (equivalent to one-tenth of the bonds of said Toledo and Indianapolis Railway Company) to be issued by the successor company.

That said successor company, the Toledo, Columbus and Southern Railway Company, did issue its said bonds.

This respondent, further answering, saith that said Toledo, Columbus and Southern Railway Company acquired corporate authority to extend its railway to Belpre, and to this end increased its stock and acquired right of way for such extension for a great distance.

That while the objects of said corporation were being well performed according to the charter of the said railway company said Burke and Hickox entered into an unlawful agreement in behalf of the Columbus, Toledo and Hocking Valley Railway Company to defeat such extension and prevent this respondent from executing and performing the said agreements, Exhibit- A and B.

And respondent further saith that subsequently to the making of said agreement between said Brown and the said Columbus, Hocking Valley and Toledo Railway Company said Burke and
290 Hickox lost the control of said Columbus, Hocking Valley and Toledo Railway Company and ceased to be its agents and directors, and thereupon, in fraud of said Columbus, Hocking Valley and Toledo Railway Company and of this respondent, said Burke and Hickox then pretended that said contract between the said Columbus, Hocking Valley and Toledo Railway Company and said Brown was originally void by the laws of Ohio and with intent to defraud this respondent, and said Columbus, Hocking Valley and Toledo Railway Company then caused said Brown to enter into another agreement with themselves personally, whereby the said Burke and Hickox pretended to acquire all the rights theretofore of the said Columbus, Hocking Valley and Toledo Railway Company in the bonds and stock of said Brown, and which they now claim passed some right to the eighty bonds referred to in their second petition.

That both agreements were then well known to Burke and Hickox to be in violation of the laws of Ohio and in fraud of the rights of this respondent and of Mason and Jillson. In pursuance of said fraudulent arrangement and for the purpose of carrying out the same said Burke and Hickox and said Brown instituted a suit in New York, alleging usury and other false charges, and thereon procured *ex parte* from Charles Donohue, then a justice of the supreme court of said State, an injunction restraining this respondent from parting with said bonds until the further order; that such injunction was an erroneous exercise of judicial power, in that it was granted on insufficient papers and upon an inadequate bond, which did not indemnify the respondent from the damages it sustained thereby.

That the real object of said suit was to enable said Burke and Hickox for themselves and their associates for the time being to obtain control of said Toledo, Columbus and Southern Railway Company and to circumvent this respondent, and it was never
291 intended to try the same or to seek the final judgment therein, as this respondent believes and so charges.

This respondent, further answering, saith that it is informed and so charges that the said agreement between the said Burke, Brown, and Hickox did not operate to divest the said Toledo, Columbus and Hocking Valley Railroad Company of its rights under the prior contract, and that the same is still, as to Burke and Hickox and said Toledo, Columbus and Hocking Valley Railway Company and its assigns, a valid and binding agreement; and by reason thereof said Burke and Hickox have no interest in the bonds referred to in their second amended petition.

That in furtherance of the said last agreement, as this respondent is informed and believes, said Brown was to maintain and carry on the suit in New York with the assistance of said Burke and Hickox against this respondent and its associates, Mason and Jillson, and to procure an injunction *ex parte*, so as to enable the said Burke and

Hickox thereby the better to acquire for themselves the profit accruing and belonging to said Mason and Jillson and this respondent under said agreement, and if possible thereby to deprive this respondent and Mason and Jillson of their lawful share of the profits of said undertaking; that respondent, for its better protection, caused said *writ* to be removed into the proper Federal court.

That in said suit in New York so continued in said Federal court the said Burke and Hickox personally employed and paid counsel and there litigated with this respondent the same contention now set up in their second intervening petition; that in said suit an immense mass of evidence was taken in one form or another by said Burke and Hickox's counsel and submitted to the circuit court of the United States for the southern district of New York upon
292 a motion by this respondent to vacate the aforesaid *ex parte* injunction theretofore unlawfully granted by the said Donohue.

That on the trial of said motion the Honorable William J. Wallace, circuit judge of the United States, after a final hearing on the merits vacated the said injunction and rendered a decision upon the merits of the controversy, which decision was rendered upon all the evidence and depositions taken in said cause, and duly adjudged that the said finance company was the lawful owner of said eighty bonds. This respondent pleads said proceedings and decision in bar of this controversy, as the same were based on all the evidence and depositions of the witnesses examined by the said counsel of said Burke and Hickox and upon the same evidence to be adduced on the hearing under the said second intervening petition.

That after said decision of his honor Judge Wallace said Burke and Hickox caused their counsel next to apply to dismiss the said suits, as the respondent then charged and now charges, with the intention of avoiding the effect of said decision and of again relitigating the same contention in this or another jurisdiction; that the said dismissal was granted only upon payment of damages occasioned to this respondent by said injunction and the costs of this respondent; that respondent's said damages were assessed at the full amount of the bond or indemnity by said Burke and Hickox given to procure said injunction; that said Burke and Hickox thereupon paid said damages and costs and then next instituted this proceeding.

That by means of said injunction and proceedings said Mason and Jillson were finally forced and induced to abandon their joint undertaking with this respondent and to assign their interest to Burke and Hickox, to respondent's great and irreparable damage; that by reason of such wrong-doing and the unlawful acts and conduct of said Burke and Hickox, in violation of said agree-
293 ment, they ought now to be estopped from coming into a court of equity to construe the same adversely to this respondent.

And respondent further saith that at the time of the making of the said agreements hereunto annexed as A and B the said bonds of the Toledo and Indianapolis Railway Company were of little

actual value and it was extremely difficult to find money for such undertakings as that contemplated thereby; that by reason of this respondent's securing the necessary money, means, and credit and financing the said undertaking set up in said agreements all the said eight hundred bonds did, however, become of value, and it was originally intended that such augmented value should inure to the benefit of this respondent.

That after the said undertaking contemplated was well under way, with good chance of complete success, said two petitioners, Burke and Hickox, conniving and conspiring unlawfully in the manner now herein complained of to defeat the said lawful undertaking set up in said agreements, did enter into a series of contracts as aforesaid with said Brown and others to compass their said end and defraud this respondent of its profit in said venture, and respondent insists that if said Burke and Hickox ever acquired any rights whatever thereby as against this respondent they were so acquired for little or no value paid by them therefor and with full notice that this respondent then claimed and possessed said eighty bonds; that the said Brown, Mason, and Jillson had before the said conspiracy between said Burke and Hickox repeatedly admitted that said finance company owned and had rightfully acquired the said eighty bonds referred to in the said petition of Burke and Hickox and they had severally acquiesced in such ownership; that Burke and Hickox are bound by the said acts of said Brown, Mason, and Jillson, and cannot under the circumstances be permitted now to contend that this respondent did not own said eighty bonds.

294 That said unlawful conspiracy set up in this article of this answer had its inception in the said agreement with said Columbus, Hocking Valley and Toledo Railway Company and Brown, made by said Burke and Hickox as managing directors, contrary to the laws of Ohio, and its termination in their second so-called intervening petition; that part of the effort of Burke and Hickox to frustrate this respondent and defeat its profiting by said adventure was to buy in the said railway property in this suit for those bonds so acquired by them from Mason and Jillson and then to exclude this respondent from any share in the proceeds of sale or in said mortgaged property. To that end said Burke and Hickox applied in this above-entitled suit for the appointment of a receiver without notice to this respondent and then had their paid agent appointed in their own interest; that thereafter, when the sale referred to in the decree was about coming on, the said Burke and Hickox procured leave to give a bond for the part of the purchase-money required to be paid in cash under said decree by the purchaser at said sale; that said Burke, having so purchased in at said sale, pretended to give said bond, as by reference to all said proceedings will appear; that there is now no fund in court whatever except said Burke's bond, and yet, so it is said, Burke and Hickox cunningly pretend by said second petition that there is now a fund in court claimed by this respondent and controverted by said Burke and Hickox which ought to be determined in this suit in the master's office, whereas in truth and in fact such contest is imaginary and

the so-called fund is wholly in Burke's possession, and the same is not now claimed by the respondent, but by others, its assigns, as set up in article third of this answer.

Therefore this respondent protests against all proofs now sought to be taken on such inquiry in the master's office and only
295 appears therein *in invitum* aid because compelled so to do, but not with any intention of establishing or trying title — said bonds in this unlawful proceeding; and as further evidence of the illegality of such inquiry so instituted by the said Burke and Hickox in the master's office this respondent avers that all said eighty bonds are admitted by Burke and Hickox to be lawful obligations of said Toledo, Columbus and Southern Railway Company, secured by the mortgage to complainant and to share in said mortgaged premises, but their pretence is that they have a right to try title to said eighty bonds by the proceedings instituted by said second intervening petition in said foreclosure suit, all of which is distinctly denied by this respondent.

Fifth.

This respondent avers, as advised, and believes that the said Burke and Hickox have not in and by their said second intervening petition stated such a case as entitled them in this court to such relief as is thereby sought against this respondent, and it prays the same benefit of this objection as if respondent had taken the same by demurrer.

Sixth.

This respondent avers, upon information and belief, that if said Burke and Hickox have any cause of action against respondent arising out of the facts hereinbefore averred and which for the purposes of this defense are again repeated paragraph by paragraph such cause of action exists at law for the recovery of the value of said eighty bonds, and that for such cause of action the said Burke and Hickox have a plain, adequate, and complete remedy as and by the course of the common law, and this court has not
296 upon the equity side thereof any jurisdiction thereof, and this respondent prays the same benefit of this objection as if the same had been taken separately by demurrer or plea.

Seventh.

This respondent avers that the Columbus, Hocking Valley and Toledo Railway Company is a necessary and indispensable party to any action or controversy relating to the interests and ownership of said T. P. Brown or his assigns in any bonds of the Toledo, Columbus and Southern Railway Company.

Eighth.

Wherefore this respondent prays the judgment, order, and decree of the court:

First. That the second intervening petition of Burke and Hickox be stricken off the files of this court.

Second. That the master do not proceed with the said enquiry.

Third. That this court has no jurisdiction of the controversy raised by said second intervening petition of Burke and Hickox.

Fourth. That in default thereof that the said petition be dismissed with costs thereof and of all proceedings thereunder against Burke and Hickox.

Fifth. That this respondent have such other, further, and final relief as may be adequate under all the circumstances.

AMERICAN FINANCE CO., [SEAL]
By J. C. SHORT, *Its Pres't.*
R. T. CLARKE, *Ass't Secretary.*
CRANE, LOCKWOOD & FOWLER,
Sol'rs and of Counsel.

297 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

On the 5th day of March, A. D. 1889, before me personally appeared John C. Short, president of the American Finance Company, and he, being by me duly sworn, did depose and say that he was the president of the respondent corporation, The American Finance Company, named in the foregoing answer, and that he has read the answer and knows the contents thereof, and that the matters and things in said answer contained are true to the knowledge of the said deponent except as to the matters therein stated to be on information and belief, and that as to those matters he believes them to be true.

[SEAL.] I. M. DITTENHOEFER,
Notary Public, N. Y. Co.

EXHIBIT A.

Articles of agreement, made and entered into on the 14th day of April, A. D. 1884, by and between Theophilus P. Brown, of the city of Toledo, in the State of Ohio, party of the first part, and the American Finance Company, a corporation doing business in the city of New York, party of the second part, witnesseth:

Whereas, the said party of the first part is the owner of all the stock, except a nominal amount, and all of the first-mortgage bonds ($800,000) of the Toledo & Indianapolis Railway Company, which said bonds are now held in hypothecation by various persons and corporations to secure the payment of certain obligations of said railway company, or said party of the first part, and

298 Whereas, the railway of said company extending from the city of Toledo aforesaid to the city of Findlay, in the State of Ohio, about forty-one miles, is now in the hands of and is being operated by a receiver, and

Whereas, there are sundry lien claims outstanding against said railway company and claims for right of way, labor and materials not secured by collateral, and

Whereas, said party of the first part is desirous of obtaining a loan or loans, as hereinafter mentioned, for the purpose of retiring said existing claims and obligations, and is also desirous of making provision for the extension of said line of railway from Findlay aforesaid to the city of Columbus and to some point in the Hocking valley in the vicinity of Straitsville in said State, and to Union City or other point on the C. C. C. & I. R. R., and in furtherance of his said plans, has applied to said party of the second part for its services, assistance and facilities in obtaining means with which to discharge said existing claims and obligations and to extend the line of said railway, as above mentioned; and said party of the second part has consented to render such services upon the terms and conditions hereinafter expressed.

Now, therefore, it is hereby agreed by and between the parties hereto, in consideration of the premises and of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, as follows:

Article I.

Said party of the first part agrees to sell and transfer the said stock and bonds and all the property and franchises of said Toledo and Indianapolis Railway Company to a new company to be organized by said party of the second part, under the laws of the State of Ohio, upon the terms and conditions hereinafter expressed, and to cooperate with said party of the second part in all proper ways in bringing about the consummation of the purposes of this agreement.

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Article II.

Said party of the second part agrees to proceed without unnecessary delay upon the execution of this agreement to the organization of said new railroad company, to be called the "Toledo, Columbus & Indianapolis Railroad Company," and to the procuring of the engraving of the bonds and stocks for the same, and of a settlement of the outstanding claims secured by the pledge of the bonds as aforesaid, and to the procuring of a loan of, say, $300,000 to $400,000 in money, as may be deemed practicable, to be made upon the pledge of said present outstanding bonds of said Toledo & Indianapolis Railway Company or upon the bonds to a like amount of the proposed new railroad company, as may be found convenient, the cash proceeds arising from such loan to be used in extending said Toledo & Indianapolis railway to a connection with the Indianapolis, Bloomington and Western railroad, at Findlay, and in taking up such of said claims as are liens prior to the mortgage made to secure said bonds; and to the settlement of all other claims—secured and unsecured—the payments on account of such settlements to be made in such manner as may be agreed upon between said party of the first part and the lender or lenders, and to be done in such a way as to extinguish all the outstanding claims against said railway company and its property.

Such loans when made are to be secured by the promissory notes of said party of the first part, with said bonds at not more than fifty cents to the dollar as collateral security.

Article III.

As soon as practicable after the organization of said new railroad company, provision is to be made by it for the issue of its stock and bonds, the same to be used in the purchase of the stock, bonds and property of said Toledo and Indianapolis Railway Company, and in the payment of said claims and obligations, and in extending
300 said railway as above mentioned and equipping the same, it being understood that the stock of said new railroad company shall be fixed at $25,000 per mile and the bonds at $20,000 per mile for each mile in length of said railroad built and to be built and equipped, and that the bonds are to have forty years to run, bearing interest at six per cent. per annum, payable semi-annually in New York, and to be secured by a first mortgage on all the rights, property and franchises of such new corporation.

Article IV.

It is understood and agreed that the stock of said new railroad company to the amount of $25,000 per mile and its first-mortgage bonds to the amount of $20,000 per mile, or the net proceeds of said bonds, are to be paid for in the stock, bonds and property of said Toledo & Indianapolis Railway Company, and that the remainder of the bonds and forty-five per cent. of the stock to be issued by said new railroad company are to be negotiated and the proceeds thereof are to be appropriated to the construction and equipment of the remainder of the line from Findlay to Columbus and the Hocking valley, and to Union City or other point as aforesaid.

Article V.

Said party of the second part also agrees to undertake the negotiation of the entire issue of the bonds and forty-five per cent. of the stock of said new railroad company for the money, means and credit necessary to retire the said securities of said Toledo & Indianapolis Railway Company, and to take up the secured and unsecured claims against the property of said last-mentioned railway company, and to extend the line of said railway from Findlay aforesaid to Columbus and Hocking valley and Union City or other points aforesaid.

301 Article VI.

There is to be allotted and paid to said party of the second part, in consideration of the premises a commission or compensation of two and one-half per centum on the amount of money raised by said party of the second part for said party of the first part by way of loans or by means of the settlement of the claims and obligations, such commission or compensation to be payable at such time as the money

received from such loan or loans shall be paid over to said party of the first part by said party of the second part, or as the existing obligations secured by the pledge of bonds as collateral shall be taken up, and as said liens and other claims shall be paid by said party of the second part, it being understood that the commissions mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about, as a result of this agreement. But it is understood and agreed that if and so far as the loan of money shall be obtained, said party of the first part is to have the right of causing the purchase of such claims and liens upon such terms as he may be able to make with the holders thereof, and that whatever discount is saved in such purchase shall inure to the benefit of said party of the first part.

Article VII.

It is also understood and agreed that said party of the second part shall have the right to negotiate the sale of the said $800,000 of bonds of said Toledo and Indianapolis Railway Company in effecting the settlement of said claims, or for any other purposes which shall be approved by the said party of the first part, and is also to have the right to negotiate all the bonds and forty-five per cent. of the stock to be issued by said new railroad company for any of the pur-
302 poses expressed in this agreement. But none of said bonds issued by either company are to be negotiated, sold or otherwise disposed of at less than ninety cents on the dollar and accrued interest without the consent of said party of the first part.

Article VIII.

Said party of the second part is to have the right to negotiate a settlement with the parties in Chicago representing the rolling mill company and holding $101,000 of said bonds as collateral for a given sum of money due to said rolling mill company or its assigns, and to use therefor bonds and stock of said new railroad company, at not less than the rate herein fixed.

Article IX.

Said party of the second part is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued, and to be issued, by said railroad companies and negotiated; said ten per centum on said bonds being payable in said bonds at par, or in the net cash proceeds of the sales thereof, at its option, and on said stock in said stock at par; such payments or deliveries to be made from time to time *pro rata* as any of said bonds shall be negotiated, sold or exchanged for outstanding liabilities or for property, labor and materials required by said railroad companies or either of them, or otherwise used or disposed of.

Article X.

In addition to the said 10 per centum of the stock hereinbefore agreed to be paid to said party of the second part as commission, there is to be appropriated and transferred to said party of the second part, as hereinbefore mentioned, in
303 further consideration of the premises and of its undertakings to secure the marketing of said bonds, the forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered to said party of the second part *pro rata*, from time to time, as said bonds or any of them shall be negotiated or otherwise disposed of, as provided in the paragraph last above written; but the total of said ten per centum commission on stock and bonds shall not exceed ten per centum of the amount issued for each mile of road in the name of the new railroad company.

Article XI.

It is further agreed and understood that *whether* the stock, bonds and property of said Toledo and Indianapolis Railroad Company shall be turned over to said new railroad company to be organized as above provided, the said party of the first part is to be thereupon elected president of said new railroad company, and is to have forty-five per cent. of the stock of said new railroad company, and the naming of a majority of the board of directors of said new railroad company, the minority thereof to be named by the party of the second part.

Article XII.

It is further agreed and understood that the work of making the connection between the present southern terminus of said Toledo and Indianapolis railway, in the city of Findlay aforesaid, and said Indianapolis, Bloomington and Western railroad is to be supervised and conducted by said party of the first part, and is to be paid for out of the cash proceeds of the loan or loans herein first above referred to.

Article XIII.

It is also understood and agreed that the proceedings now pending in the United States court for the foreclosure of the mort-
304 gage given to secure said $800,000 of bonds of said Toledo and Indianapolis Railway Company shall be prosecuted to completion, unless all the outstanding liabilities of said Toledo and Indianapolis Railway Company shall be paid and discharged; and the road left free to its stockholders, to be turned over to said new railroad company in such manner as to make the title of said new railroad company in said Toledo and Indianapolis property complete, free and clear. But said party of the first part is to use all proper means in his power to hasten or retard said foreclosure, as the said party of the second part may deem to be in the interest of its proposed negotiations; and when if said sale shall take place under said fore-

closure, said party of the second part shall have the right, at its election, to cause said property to be purchased by said new railroad company at such foreclosure sale, in accordance with the purpose of this agreement.

Article XIV.

It is hereby mutually agreed and understood by and between the parties hereto that if a loan is not obtained in time to pay off the present debts of the said Toledo & Indianapolis Railway Company (excepting its first-mortgage bonds), before said railway is sold at judicial sale, or the money provided with which to purchase the said railway at said judicial sale, and said railway shall not be so purchased by the said party of the second part, as hereinbefore provided, that this contract shall be null and void and no compensation or commissions or expenses of any kind shall be claimed by the said party of the second part; and when said loan is obtained of sufficient amount to pay off said claims, or said railway shall be purchased at said judicial sale, as hereinbefore provided, it is agreed that unless said party of the second part shall raise money,
305 means or credit necessary for the extension of said railroad to Columbus, Ohio, or other point to be agreed upon by the parties hereto, within one year from the date of procuring the said loan, or from the date of the purchase of said railway, then and in that case this contract for negotiating the securities for said extension may, at the option of said party of the first part, become null and void.

Article XV.

The trust company which shall act as trustee of the mortgage securing the bonds of the new railroad company shall be selected by the concurrence of the parties hereto, and shall be from those now located in the city of New York; and all bonds, except those relating to the line from Findlay to Toledo, shall remain in the custody of said trust company until drawn out by agreement of the parties hereto. Said party of the second part hereby agrees to advance for said new railroad company all expenses of organizing it, and for engraving its bonds and stock; and is to have such engraving done in such a manner as will make them eligible to be listed on the New York stock exchange; and it is also agreed that if said party of the first part procures the loan on the present bonds of the Toledo and Indianapolis Railway Company, no commission shall be claimed for the same by the said party of the second part.

It is further agreed and understood that if said party of the second part shall find it necessary in conducting said negotiation to give or agree to give a majority of the stock of said new railroad company to the purchasers of said bonds, then and in that case a sufficient contribution is to be made by said party of the second part from its stock commissions herein provided for to make such majority. But in case the securities of said new company so to be organized by said party of the second part, in pursuance of this

agreement, shall be used in the purchase of bonds, stock or
306 property of said Toledo and Indianapolis Railway Company, and said extension shall not be made, then and in that case said party of the first part is to have a majority of said stock; and also that it is the intention of this agreement that if the proper amount of the securities of said new railroad company shall in any manner be utilized or used in acquiring said Toledo and Indianapolis Company's securities or property, said party of the second part is to be paid its commissions as hereinbefore fixed.

In testimony whereof, said party of the first part has hereunto subscribed his name, and said party of the second part has caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary, on the day and year first above written.

T. P. BROWN.

[SEAL.] AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*

Attest: WM. P. WATSON, *Secretary.*

EXHIBIT B.

Tripartite agreement made and entered into on the 24th day of September, A. D. 1884, by and between Theophilus P. Brown of the city of Toledo, in the State of Ohio, party of the first part; the American Finance Company, party of the second part, and Israel B. Mason of Providence, and Francello G. Jillson of Woonsocket, in the State of Rhode Island, parties of the third part, witnesseth:

That whereas, an agreement was entered into under date of
307 April 14th, 1884, by and between said parties of the first and second parts (copies of which are held by each of the parties hereto) in relation, among other things, to the negotiations undertaken by said party of the second part for said party of the first part, to the amount of $325,000, and also to the negotiations of $800,000 of the stock and $800,000 of the first-mortgage bonds of said Toledo & Indianapolis Railway Company, and said party of the second part has requested said parties of the third part to take said notes on behalf of themselves and associates, and said parties of the third part have consented thereto, upon and subject to the terms and conditions herein expressed, and subject to the consummation of all the details to the satisfaction of all the parties hereto.

It is therefore hereby agreed by and between the parties hereto, that said terms and conditions are and shall be as follows:

1. Said Brown is to make, endorse and deliver his several promissory notes in approved form and denominations, payable to his own order within two years from this date, with interest at 6% per annum from date, said interest to be payable semi-annually, and said notes to be accompanied by first-mortgage bonds of said Toledo and Indianapolis Railway Company, at the rate of fifty cents on the

dollar as collateral security, said bonds bearing coupons maturing April 1st, 1885, all past-due coupons and those maturing October 1, 1884, being first taken off and cancelled.

2. The net proceeds of said loan are to be applied to the purchase and taking up of the present outstanding claims against said Toledo and Indianapolis Railway Company and its property, secured and unsecured (including the purchase by said Brown of the interest of Patrick Dowling, contractor, in said railway), and to the payment of the expenses incident thereto; and also to the building of an extension of said railway from its present southern
308 terminus to a connection with the Indiana, Bloomington and Western, and the Lake Erie and Western railroads, at Findlay, O.; and also to the payment of the balance due on rolling stock heretofore purchased by said Toledo and Indianapolis Railway Company.

3. All the outstanding claims so purchased and taken up as aforesaid by the use of the proceeds of said loan are to be, so far as practicable, assigned in blank or to said American Finance Company, to be held by it in trust as follows: When all the claims not secured by said first-mortgage bonds as collateral shall have been purchased and taken up, the same are to be forthwith cancelled; but this stipulation shall not prevent the cancellation at any time of any portion of said claims not secured by bonds as collateral, whenever said first and third parties may agree to such cancellations, and all claims secured by bonds as collateral which shall be so purchased and taken up, are to be assigned and delivered to said American Finance Company in trust, for the common use, benefit and protection of all holders of said first-mortgage bonds. And when said loan shall be paid, or sooner if the parties thereto shall agree, said claims so secured are to be cancelled.

4. If any of the proceeds of said loan shall remain after the purchase and delivery of said claims as above provided, such residue shall be then paid over to said Brown.

5. All the $800,000 full-paid stock of Toledo & Indianapolis Railway Company, (except a nominal amount thereof held by the directors for qualification), is also to be issued and deposited with said American Finance Company, and is to be disposed of as follows: Upon the payment of said loan, or in case of default of such payment, there is to be issued and delivered by said trustee to said parties of the third part, $360,000 of said stock; to said Brown $408,000 thereof, and to said American Finance Company $32,000 thereof, the same to be issued in the names of said parties respectively.

309 6. A bonus of ten per cent. on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of such purchase, in the first-mortgage bonds of said Toledo & Indianapolis Railway Company at par.

7. Upon the purchase, assignment and delivery of the claims secured by the pledge of first-mortgage bonds, such action shall be taken in relation to the receivership, taking judgment on such claims

or the entering of a decree of foreclosure, or the dismissal of the suit of the Union Trust Company of New York, trustee, now pending, as the parties hereto may deem best, it being understood that upon the request of the holders of said notes, said Brown, acting as president of said Toledo & Indianapolis Railway Company is to forward or retard all legal proceedings now pending or such as may be hereafter commenced, as the holders of said notes may deem advisable.

8. The net proceeds of said notes are to be deposited in such bank or trust company as the said Mason and Jillson, and said American Finance Company may designate; such deposit to be made for the credit and account of said "American Finance Co., trustee," in trust, for disbursement by it for the purposes hereinabove expressed.

9. All the remainder of said $800,000 of first-mortgage bonds of said Toledo and Indianapolis Railway Company over and above the $650,000 of the same pledged to secure the payment of said $325,000 of said notes, are hereby appropriated as follows: (1) To the purchasers of said notes their said bonus, amounting to $65,000 thereof, to be distributed among them *pro rata*, according to their respective holdings of said notes; (2) to said American Finance Co. $80,000 thereof, in full payment of all its claims for commission
310 for negotiating said $800,000 of said bonds; (3) to said Brown $5,000 thereof; such appropriations and the delivery of said bonds to be made from time to time, *pro rata*, as said notes are disposed of.

10. It is also further agreed and understood that when the proposed new railroad company, contemplated and provided for in said agreement between said first and second parties hereinabove referred to, shall have been organized and shall issue its bonds and stock for the purchase of the bonds and stock of said Toledo and Indianapolis Railway Company to a like amount now outstanding, and for extending said railway to Columbus, O., and said purchase shall be consummated, said Brown is to receive all the excess of bonds and stock so to be issued in payment for said T. & I. railway, which shall be issuable by said new railroad company at the rate of $20,000 per mile of each (bonds and stock) for all the road which shall be in operation from the tracks of the Indianapolis, Bloomington and Western, and the Lake Erie and Western railroads at Findlay, O., to Toledo, O., after providing for said outstanding stock and bonds of said Toledo and Indianapolis Railway Company, it being understood that the road now in operation is about forty miles in length, and that when said connection or extension at Findlay is completed, there will be over forty-one miles in length, upon which bonds and stock of the new railroad company are to be issued at the rate of $20,000 per mile of each.

11. In consideration of the personal services of said Mason and Jillson in the examination of said Toledo and Indianapolis railway, and of the responsibility assumed by them as endorsers and in bringing their associates in the loan, it is agreed that when the $650,000 of bonds pledged as collateral as aforesaid, are sold, and said loan is paid, and said Brown is entitled to receive the excess

over and above the payment of said loan, said Mason and
311 Jillson are to receive $50,000 of said bonds, or the proceeds of the sale thereof, to their own personal use.

12. It is agreed that until said loan is paid, all the net earnings of said Toledo and Indianapolis Railway Company from the time of its completion to a connection with said Indianapolis, Bloomington and Western, and said Lake Erie and Western railroads, are to be applied as follows:

1. To the payment of the interest on said notes. 2. To the payment of the interest on said remaining $150,000 of bonds; and 3, to the payment of interest on said $650,000 of said bonds.

But it is also agreed and understood that in case such net earnings, when so applied, shall not be sufficient to pay such interest and coupons from the date of the making of the connection with said railroad last above named to the maturity of said loan, that no default is to be taken or declared on said coupons maturing prior to the maturity of said loan, and no proceedings at law shall be taken against said Toledo and Indianapolis Railway Co. to enforce the payment of the same; but this provision shall not be construed to prevent such proceedings from being commenced and prosecuted at any time subsequent to the maturity of said loan, nor to abate to any extent the amount of interest and coupons so to be paid.

In testimony whereof, the several parties hereto have subscribed this agreement on the day and year first above written.

T. P. BROWN,
AMERICAN FINANCE CO.,
By J. C. SHORT, *Pt.*
I. B. MASON.
FRANCELLO G. JILLSON.

312 Afterwards, to wit, on the 9th day of March, A. D. 1889, there was filed in the clerk's office of said court the following affidavits, to wit:

Affidavits of Crow, Ashley, & Hazard.

Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY and Another. } Affidavit.

Now comes Moses R. Crow and, being duly sworn, on oath deposes and says as follows: That he is counsel for the petitioners in the petition to set aside the sale in the above matter to Stevenson Burke of the railway and property of the defendant under the petition filed at Toledo February 15th, 1889, in the above entitled case, and also in that filed October 18th, 1888; that deponent was first

retained in this matter on or about January 28th, 1889, at which time Hon. Joel W. Tyler was in New York and consulting with deponent and certain of said petitioners, and then said J. W. Tyler informed deponent that the hearing to set aside said sale would be had about the middle of February, at Toledo, before Judge Jackson, and that the necessary papers should be prepared and forwarded; that deponent arranged to prepare and did prepare said papers, to wit, the papers filed on February 15th in the office of the clerk of this court, which are intended to be an addition to the papers filed on October 18th, 1888, which said papers of October 18th, together with very much more of the record filed in the clerk's office in this matter, deponent did not see until March 7th, 1889; that on Sunday, February 3rd, deponent was called to the house of R. N. Hazard, one of said petitioners, and shown a telegram from
313 Toledo to the effect that said hearing would be had February 4th, Monday; that said papers were not then prepared and it was impossible to prepare them and reach Toledo in time for said hearing; therefore the said hearing could not have been had on the proper papers, to wit, the papers filed February 15th, 1889; that deponent had an understanding that Stevenson Burke, the purchaser of said railroad property, was not to press said hearing before the middle of February, 1889; that deponent set forth at large said understanding on the hearing before A. J. Ricks, special master, as to certain questions herein, together with certain objections and protests of deponent on March 7th, 1889, at Cleveland Ohio.

And deponent prays leave to refer to and use the stenographic minutes thereof on the hearing of the said petition, motion, and matter on March 19th, 1889, herein.

MOSES R. CROW.

Subscribed in my presence by the said Moses R. Crow and sworn to by him before me this eighth day of March, A. D. 1889.

CHAS. G. F. VON W. EMERY,
[SEAL.] *Notary Public.*

314 Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY and Another. } Affidavit.

Now comes James M. Ashley and, being first duly sworn, on his oath deposes and says that he is a resident of the city of Toledo, Lucas county, Ohio; that he is the owner and holder of seven bonds of one thousand dollars each issued by The Toledo, Columbus & Southern Railway Company, the defendant in the above entitled action; that deponent is one of the petitioners in the petition filed in the office of the clerk of the above-entitled court on the 15th day

of February, 1889, praying that the sale under foreclosure proceedings in the above action of the said railway property for six hundred thousand dollars to Stevenson Burke and Charles Hickox may be set aside, together with the order purporting to confirm said sale; that deponent never made any prior application to that of said February 15th, 1889, and the petition therein mentioned to have said sale and the confirmation or alleged confirmation thereof set aside; that deponent had no notice of such confirmation and was not represented at the motion to confirm the said sale; that deponent never had any notice of said alleged sale, and that no proper notice of said alleged sale was given, to wit, the notice required in and by the terms of the mortgage; that deponent became the owner and holder of the said bonds of said The Toledo, Columbus & Southern Railway Company prior to the said alleged sale and confirmation and has since held and owned and now holds and owns the
315 said seven bonds, the title of which this deponent obtained from R. N. Hazard, of New York city; that deponent is the president of the Toledo, Ann Arbor and North Michigan Railway Company; that deponent has for several years been engaged in railroad business and railroad management; that deponent knows the property and railroad known as the Toledo, Columbus & Southern railway, built and running from Toledo to Findlay, Ohio, and is familiar with the value thereof; that the said property is, in deponent's opinion, worth at least $800,000, eight hundred thousand dollars, and that if a resale thereof be ordered the said property will, as deponent verily believes, bring at such resale at least seven hundred thousand dollars and, as deponent verily believes, will bring more than seven hundred thousand dollars; that if the sale as now made and confirmed is allowed to stand it will work great injustice to the holders of the bonds of the Toledo, Columbus & Southern Railway Company, including the petitioners in this petition. The deponent has been apprised of and seen a copy of the order entered by this court on February 4th, 1889, purporting to confirm the sale of the said railroad property, but this deponent had no part in or notice of any such hearing or notice of such order until he was shown the same this 6th day of March, 1889. Deponent further says that he has seen a copy of the decree entered in the above-entitled action providing for the sale of said railroad for not less than six hundred thousand dollars: that deponent did not appear in said action and has not been represented at any sale thereof; that deponent was not represented upon the entry of said decree, nor did he consent thereto, either personally or by counsel, or consent or authorize the insertion in such decree of the clause regarding
316 the sale of said railroad property for six hundred thousand dollars or any other sum, nor did this deponent, as such bondholder of such railway company, at any time consent to the said decree or any of the provisions therein contained or to the said order of confirmation entered in this court on February 4th, 1889.

Wherefore this deponent, as petitioner, confirming the said petition filed herein on February 15th, 1889, prays that this court may make an order setting aside the said sale of the said railway made

to Stevenson Burke and Charles Hickox, and also the said order of February 4th, 1889, confirming or purporting to confirm the said sale, and also setting aside the said decree entered in the above matter authorizing a sale of said road, or that the said decree may be amended so as to conform with the facts and with the terms of said mortgage and require a proper notice, to wit, the notice required by the mortgage, and that said railroad and property be properly appraised, and that no sale thereof shall be made for less than the value thereof, and for such other relief, decree, or order in the premises as may be just, proper, and equitable; and your petitioner will every pray.

JAMES M. ASHLEY.

Subscribed in my presence by the said James M. Ashley and sworn to by him before me this sixth day of March, 1889.

CHAS. G. F. VON W. EMERY,
[SEAL.] *Notary Public.*

317 Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
against
TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Rowland N. Hazard, being duly sworn, says that he was one of the petitioners named in the petition to set aside the sale and the confirmation thereof in the above matter, and that he is one of the holders and owners of the bonds of the said Toledo, Columbus & Southern Railway Company for the par value thereof of $20,000, to wit, 20 bonds of $1,000 each; that deponent was the owner and holder of twenty-seven bonds and $22,500 in par of the stock on the said Toledo, Columbus & Southern Railway Company, but that deponent now holds and owns the said 20 bonds and the said $22,500 of stock, having sold and transferred seven of said bonds to J. M. Ashley, of Toledo; that defendant has only just been shown a certified copy of an order certified by the clerk of the said United States circuit court, Augustus J. Ricks, on February 25th, 1889, purporting to have — made February 4th, 1889, which denies a motion on behalf of this deponent, among others, to set aside the sale of said Toledo, Columbus & Southern Railway Company's property, and that deponent for the first time saw such order or knew of its having been entered on February 25th, 1889; that deponent had understood *that* the order entered at that time to simply confirm the sale, and that deponent had been so informed by John C. Short and believed the same to be true; that his honor Justice Jackson, sitting at said time, indicated or announced that
318 if parties stood ready or prepared to give a proper bond he would entertain the question of setting aside the sale, and thereafter deponent was very much surprised on finding that said

order contained the name of deponent as appearing to have moved specifically to have set aside the said sale and to have had the same motion denied upon the merits; that some time prior to the hearing of February 4th, 1889, Honorable J. W. Tyler, of Cleveland, was in New York consulting with this deponent regarding the hearing to set aside the said sale; that it was then understood that the papers should be prepared and forwarded therefor, to wit, the same were similar papers to those which are filed on the motion herein on February 15, 1889, including the petition of this deponent and others; that deponent was thereafter informed and believes the same to be true; that the hearing of the said matter had been postponed for about twenty days, and that such information was derived from the said John C. Short by this deponent as having come from Stevenson Burke; that deponent's attorney, Moses R. Crow, was busy preparing the papers, which were filed on or about February 15th, herein; that on Sunday evening, February 3d, when deponent arrived at his house, he found there a telegram too late to reach his attorney and reach Toledo, and, not having the papers prepared, so advised J. W. Tyler, at Toledo; that since the said hearing until seeing the said certified copy of order on the 25th day of February, 1889, deponent had not known that any order had been entered denying a hearing or purporting to deny a hearing on the merits on behalf of deponent and others for the setting aside of the sale herein; that such matter could not have been properly presented to the court on behalf of this deponent on said day for reason that the
319 proper papers on behalf of this deponent were not then before the court, to wit, the papers which were filed on or about the 15th day of February, 1889, in the office of the clerk at Toledo, Ohio, by this deponent, as petitioner, and others.

That deponent derived his title to the bonds and stock which he holds in this matter by transfer and delivery thereof to this deponent of the same from the Columbus, Hocking Valley & Toledo Railway Company and from the president of said railway company under and by virtue of a certain contract dated the 21st day of March, 1887, a copy of which is hereto annexed and made a part of this affidavit and marked Exhibit A; that the title thereto of the said bonds and stock of the said Columbus, Hocking Valley and Toledo Railroad Company was acquired to such bonds and stock under and by virtue of a certain agreement dated December 10th, 1885, between Theophilus P. Brown, of Toledo, and the Columbus, Hocking Valley & Toledo Railroad Company, a copy of which is hereto annexed and made part of this affidavit and marked Exhibit B, or else in pursuance of arrangements or agreements of a similar nature between said parties subsequent thereto and which were all made through Stephenson Burke as vice-president of the said Columbus, Hocking Valley & Toledo railroad, who signed the said contract, Exhibit B, for and on behalf of said railroad company as its vice-president; that the said Stephenson Burke is the same person and party who acquired title to the bonds as mentioned in the affidavit of John C. Short and filed among the moving papers herein on February 15th, 1889, and is the same person who, together with

Charles Hickox, as deponent is informed and believes, was the purchaser of said railroad property of the Toledo, Columbus & Southern railway at the foreclosure sale for the same for $600,000; that
320 deponent paid in cash the sum of $40,000 for his said $27,000 bonds and $22,500 in stock of said Toledo, Columbus & Southern Railroad Company under said contract, Exhibit A, annexed hereto, and which contract was never thereafter carried out, for the balance of said securities to be delivered as therein agreed by the said Columbus, Hocking Valley & Toledo railway; that deponent prays leave to refer herewith as part of the papers on which this motion shall be heard to the bill of complaint filed by the American Loan & Trust Company in the above-entitled action and all the subsequent papers filed in the said suit in the office of the clerk of this court, and deponent submits that under all the circumstances and the papers as set forth and filed and the facts in this case it would be unjust and inequitable to allow the said sale to stand as made to the said Stevenson Burke for said $600,000.

R. N. HAZARD.

Sworn to before me this 27th day of Feb., 1889.

W. E. CORTELYON,

[SEAL W. E. C.] *Notary Public, Kings Co.*

Certified in N. Y. Co.

321 "EXHIBIT A."

Memorandum of agreement made this 21st day of March, 1887, between the Columbus, Hocking Valley and Toledo Railway Company of the first part, and Rowland N. Hazard of the second part, witnesseth:

That the said party of the first part, in consideration of the promises and agreement hereinafter contained, hereby agrees to sell and assign to the said Rowland N. Hazard all its right, title, interest and property in or to or under and by virtue of a certain agreement, a copy of which is hereto attached, bearing date the 10th day of December, 1885, between T. P. Brown of Toledo, Ohio, and the said The Columbus, Hocking Valley and Toledo Railway Company, and in consideration thereof the said Rowland N. Hazard, party of the second part, agrees to pay unto the said The Columbus, Hocking Valley and Toledo Railway Company, the sum of one hundred and forty thousand dollars in cash; forty thousand dollars on the execution of this memorandum, and one hundred thousand dollars on or before the fifth day of April, 1887; and also covenants, promises and agrees to and with the party of the first part that the said party of the second part shall and will indemnify and save harmless the said The Columbus, Hocking Valley and Toledo Railway Company, its successors and assigns, against the said contract with Brown dated the 10th day of December, 1885, and from and against the covenants and agreements of the said railway company in said con-

tract contained and from and against any and all suits and actions, whether well founded or otherwise, and all cost, loss and damage arising therefrom or by reason thereof.

For the same consideration the party of the second part hereby covenants and agrees that the railroad of the Toledo, Columbus and Southern Railway Company, a large amount of whose stocks and bonds are covered by the said contract of December 10th, 1885, shall not be extended nor shall any branch thereof be built, either by the said company or by or in the name of any other company in its interest, to or through any point which shall be east of the meridian of Toledo.

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It is covenanted and agreed that until the full payment of the said sum of one hundred thousand dollars herein agreed to be paid on the fifth day of April, the party of the first part shall hold the said contract of December 10th, 1885, and all right, title, interest and property therein, thereunder or by virtue thereof as security for the payment of said sum, and that in case of default by the party of the second part in the payment thereof or any part thereof, as and when the same shall become due according to the terms thereof, the party of the first part shall be at liberty to consider this contract as forfeited and annulled and to retain all sums which shall then have been paid hereunder as liquidated damages.

In witness whereof, the party of the first part has caused these presents to be signed by its president, and the party of the second part has hereunto set his hand and seal the day and year first above written.

COLUMBUS, HOCKING VALLEY & TOLEDO R. R. CO.,
By JOHN W. SHAW, *President.*
R. N. HAZARD. [SEAL.]

323 "EXHIBIT B."

Memorandum of agreement between T. P. Brown, of Toledo, Ohio, and the Columbus, Hocking Valley and Toledo railway, made this 10th day of December, 1885, as follows:

Whereas, said Brown is largely interested in the Toledo, Columbus and Southern Railroad Company, a company having a line constructed from Toledo to Findlay, Ohio; and

Whereas, the Columbus, Hocking Valley and Toledo Railway Company is desirous of obtaining said railroad for the purpose of using the same as a branch or feeder to its line; and

Whereas, the said Toledo, Columbus and Southern Railroad Company is now represented in bonds to the amount of eight hundred and twenty-five thousand dollars, and like amount of stock; and

Whereas, said Brown is the owner of about four hundred and thirty thousand dollars, par value, of said stock, and of about six hundred and fifty thousand dollars of the bonds of said company; and

Whereas, he has heretofore borrowed upon the bonds of said company pledged by him, the sum of three hundred and twenty-

five thousand dollars and interest, and has made other arrangements touching the bonds and stock of said company; and

Whereas, it is believed to be for the interest of the parties hereto to make such arrangements as to place the property in the hands and control of the Columbus, Hocking Valley and Toledo Railway Company, it is therefore agreed as follows:

1. That as soon as possible all the indebtedness of said Brown for which said bonds have been pledged, shall be taken up and cancelled and said bonds retired and cancelled and that all
324 the stock of said company not at present owned by said Brown shall be taken up and turned over to the Columbus, Hocking Valley and Toledo Railway Company or its nominee. That with the view of enabling said Brown to retire his said indebtedness and repossess himself of the stock and bonds held by him in said Toledo, Columbus and Southern Railroad Company, the said last-named railroad company will make and execute its mortgage upon said railway line, in the usual form, securing five hundred bonds of one thousand dollars each, drawing interest payable semi-annually at the rate of five per cent. per annum; and that the payment of the interest and principal of said bonds shall be guaranteed by the Columbus, Hocking Valley and Toledo Railway Company. That four hundred and sixty thousand dollars of said bonds, or so much thereof as may be necessary, shall be appropriated to the payment of the indebtedness of said Brown as aforesaid and the residue of said four hundred and sixty thousand dollars shall belong to said Brown unless said indebtedness shall be settled and cancelled or in some way retired for a less sum than three hundred and thirty-five thousand dollars; in which event, any sum which may be saved out of three hundred and thirty-five thousand dollars shall belong to the said Columbus, Hocking Valley and Toledo Railway Company. The remaining forty thousand dollars of bonds shall be left in the treasury of the Toledo, Columbus and Southern Railroad Company as assets of the company. If it shall be found necessary to sell said bonds in order to retire the indebtedness of said Brown, he shall not be charged with a greater discount thereon than five per cent. amounting to not more than seventeen thousand five hundred dollars; but said bonds are to be sold for the highest price that can be obtained therefor, or the bonds themselves are to be used in the settlement and liquidation of such indebtedness.

325 2. Said Brown shall assign and turn over to the Columbus, Hocking Valley and Toledo Railway Company, as security, his contract with Am. Finance Co. & Mason & Jillson, covering sundry bonds and shares of stock upon receiving the sum of fifteen thousand dollars in cash or notes to his satisfaction, and upon the consummation of the arrangement by the retirement of the bonds and the regaining of the possession and the control of the stock of said Toledo, Columbus and Southern Railroad Company all said stock and bonds shall be retired and cancelled or at the option of the purchaser, enough stock shall remain to equal the sum of six hundred

thousand dollars, of which sum the purchaser shall have four hundred thousand and said Brown two hundred thousand dollars.

3. Said Brown by his counsel or otherwise shall proceed with as much diligence as possible to acquire possession of the bonds and stock aforesaid and to deliver the same to the purchaser for cancellation under this contract. The details of the reorganization, cancellation of bonds and stock and the issue of new bonds and stock shall be such as shall be advised by counsel and reasonably adapted to the purpose of the complete reorganization of said Toledo, Columbus and Southern Railroad Company upon the basis contemplated by this memorandum. Said Brown shall remain, as at present, in charge of the affairs of said last-named railroad company until this arrangement is fully consummated, and shall receive the salary which he is at present receiving. Both parties to aid in every way possible to consummate the change contemplated hereby as rapidly as possible.

If said purchase shall be fully consummated, said Brown shall own and retain said sum of $15,000 as part of the purchase-
326 money; but if for any reason it shall fail to be carried out, said sum of $15,000 shall be repaid to said Ry. company with interest and the security held surrendered.

Subject to approval of board.

(Signed) THE COLUMBUS, HOCKING VALLEY & TOLEDO RY CO.,
By S. BURKE, *V. Pres't.*
T. P. BROWN.

Approved by board of directors December 12th, 1885.
W. M. GREENE,
Sec'y C., H. V. & T. Ry.

327 Afterwards, to wit, on the 19th day of March, A. D. 1889, there was filed in the clerk's office of said court the following notice, to wit:

Notice of Hearing.

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

The American Loan and Trust Company, Stevenson Burke, and A. W. Hickox:

You will please take notice that Roland N. Hazard, the American Finance Company, J. C. Short, M. E. Goodwin, W. Life, O. H. Short, E. M. Church, and J. M. Ashley will appear before his honor Howell E. Jackson, United States circuit judge, at the United States

court-room, in the city of Cleveland, Ohio, at 10 o'clock a. m. on Tuesday, the 19th day of March, A. D. 1889, or as soon thereafter as the convenience of the court will permit, and that at said time and place said parties will move the court:

1st. To set aside the decree entered in the above-entitled suit of the American Loan and Trust Company against the Toledo, Columbus and Southern Railway Company *et al*, under date of June 23rd, 1887, and the decree confirming the sale of property involved in said suit, entered under date of February 4th, 1889, or
328 amending said decree so as in all things to comply with the mortgage set up in said suit.

2nd. To set aside the reference in said suit ordered and to substitute in place thereof a proper order of reference.

3rd. And if the said decrees or either of them be allowed to stand that the bond and stock holders be permitted to participate in any reorganization of said railroad and property.

4th. That a resale of said railroad and property be made according to law and the terms of said mortgage.

5th. And, further, that a rehearing and a proper hearing be had and allowed of the said order or decree entered February 4th, 1889.

6th. On the hearing of said motion all the proceedings and papers filed in the above-entitled action will be used.

MOSES R. CROW &
SWAYNE, SWAYNE & HAYES,
Attorneys for Roland N. Hazard and Others Above Mentioned.

We acknowledge service of notice of above hearing by copy hereof left with us this 12th day of March, 1889.

DOYLE, SCOTT & LEWIS.

329 Afterwards, to wit, on the 30th day of March, A. D. 1890, there was duly entered on the journal of said court the following order, to wit:

Motion to Set Aside Sale Overruled.

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant, *vs.* THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*, Defendants.	No. 495.	Chancery.

This day this cause came on to be heard on the motion and petition of the American Finance Company, J. C. Short, F. A. White M. D. Stuart, Mary E. Short, M. E. Goodwin, W. Life, O. H. Short, E. M. Church, R. N. Hazard, and J. M. Ashley filed herein on the 15th day of Feb., 1889, and also upon the motion of Roland N. Hazard, the American Finance Company, J. C. Short, M. E. Goodwin, W. Life, O. H. Short, E. M. Church, and J. M. Ashley, by M.

R. Crow and Swayne, Swayne & Hayes, attorneys, etc., this day filed (if the same has not been filed heretofore), service of notice of which was acknowledged on the 12th day of March, 1889, by Messrs. Doyle, Scott and Lewis, solicitors, etc., in this cause, upon the affidavits and proof *pro* and *con*, as appears on file, whereupon the court, being fully advised, is pleased to order, adjudge, and decree that said motions and petitions be disallowed and overruled.

To such action on the part of the court the above-named parties, moving and petitioning to set aside the sale made in this cause and the confirmation thereof entered at the present term of this court, to wit, on the 4th day of Feb., 1889, except and pray
330 an appeal from said action of the court, which prayer is granted upon said parties giving bonds for costs thereof, which shall not operate as a supersedeas or stay of the execution of said decree of Feb. 4th, 1889, in the sum of two thousand dollars, to the approval of the clerk of this court; but if said parties or any of them shall desire or move for a stay or supersedeas the court will determine the same and the amount of bond to be given therefor by further order herein.

HENRY B. BROWN,
District Judge.

331 Afterwards, to wit, on the 25th day of March A. D, 1890, there was filed in the clerk's office of said court the following report of special master, to wit:

Report of A. J. Ricks, Special Master, to Ascertain the Holders of Certain Bonds, &c.

In the Circuit Court of the United States, Northern District of Ohio Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and Others.

This is a reference to the master to ascertain who are the holders of certain bonds issued and secured under the mortgage foreclosed in this action and to what extent they are entitled to share in the distribution of the proceeds of the sale of the mortgaged property. It appears that one thousand bonds were authorized to be issued by the mortgage in question. Of this number 825 only are outstanding, numbered from 1 to 825, inclusive. The parties who claim to be the owners and holders of these bonds and entitled to a distributive share of the proceeds are as follows: Stevenson Burke and Charles Hickox are the owners and holders of 713, namely, Nos. 1 to 693, inclusive; No. 717 and Nos. 782 to 800, inclusive, and their title to these bonds is undisputed.

The American Loan and Trust Company of New York holds 27 of these bonds, to wit, Nos. 694, 695, and 801 to 825, inclusive, and

holds these bonds as collateral security to two notes made by James M. Ashley and their title thereto, and their right to receive
332 and participate in a distribution of the proceeds of this sale is disputed. The title to the remaining 85 bonds, namely, those numbered from 696 to 716, inclusive, and from 718 to 781, inclusive, is in dispute in this proceeding.

Those bonds are in the possession of the following persons, who claim title thereto as owners or pledgees, and these bonds were either produced before the master at his hearing in New York or were satisfactorily shown to be in the control and possession of the parties who claim title thereto.

The American Loan and Trust Company holds 20 bonds, numbered 750 to 779, both inclusive, as collateral to a note for $1,400 made by the American Finance Company and given upon a loan of that sum made by the trust company to the finance company September 13th, 1887.

Said trust company also holds 5 additional bonds, numbered 712, 737, 738, 741, and 746, as collateral to a note for $2,000 made by J. C. Short and dated April 7th, 1888.

Henry W. Cannon holds 5 bonds, numbered 747, 749, 764, 765, and 766, which he purchased and paid for in cash some time in the latter part of the year 1887.

J. A. Jillson holds ten bonds, numbered from 699 to 708, inclusive, as collateral to a note of the American Finance Company or of J. C. Short for $8,8000 discounted by said Jillson in March, 1887.

William Life holds five bonds, numbered 714, 718, 735, 744, and 745, and holds two of these, to wit, 714 and 718, as collateral security to a note for $1,500 made by John C. Short, the date of which the evidence does not disclose. Whether he holds the other three as pledgee, purchaser, or otherwise does not appear. Dr. F. Beach holds two bonds, numbered 722 and 723, as collateral to a note made by John C. Short for $1,500. The testimony does not show the date of this note.

333 Mr. Wilson holds bond No. 740 as collateral to a loan of $900 cash for which no note was given. The date of the loan not shown.

Mr. Clark, of Bridgeport, holds two bonds numbered 713 and 716 as collateral to two notes of the American Finance Company for $750 each, made some time in 1888.

Robert Black holds bond numbered 739 as collateral to a loan of $900 made to the finance company.

George B. Barnes holds bond numbered 742 as collateral to a note of the American Finance Company given for a loan of $400.

H. Hamlin holds bond numbered 771 as collateral to a note of Oscar H. Short for $800.

James B. Mott holds two bonds numbered 715 and 772 as collateral to a loan of $2,000 made by William A. Minor, dated Nov. 1st, 1888.

J. A. Sperry holds ten bonds numbered 719, 724, 743, 767, 768, 769, 773, 774, 780, and 781, as collateral to a note of William A. Minor for $10,000, which note bears date Nov., 1888.

Eliza M. Church holds bonds numbered 720 and 721, which she purchased for cash at 97½ cents on the dollar.

W. P. Watson holds bonds numbered 730 to 734, inclusive, which were delivered by the finance company to him as a stockholder of said company by way of a dividend on his stock.

Wilbur F. Day holds bond numbered 710 as collateral security for an obligation of John C. Short for $1,000, given in May, 1888.

L. H. Bristol holds bond numbered 711 as collateral security for an obligation of J. C. Short for $1,000.

334 George A. Scott holds bond numbered 697 as collateral security for an obligation of J. C. Short, given in or about May, 1888.

C. A. Hopkins holds bond numbered 696 as collateral security for an obligation of J. C. Short, given in or about May, 1888.

Mary E. Goodwin holds five bonds numbered from 725 to 729, inclusive, which she purchased at par from J. C. Short.

Mr. Field holds bond numbered 736, whether as purchaser or pledgee does not appear.

The estate of H. H. Stewart holds bonds numbered 709 and 748, whether as purchaser or pledgee does not appear.

As before stated, the owners or holders of these bonds or their agents appeared before the master at the hearing in New York and either produced the bonds or gave such evidence of the fact that they held the bonds as was satisfactory to the counsel representing the intervening petitioners Burke and Hickox, and the proof was satisfactory to the master that they actually held these bonds as claimed; whether they are *bona fide* holders or not depends upon the facts hereafter to be stated.

The title to these bonds is claimed by Messrs. Burke and Hickox as the assignees or representatives of T. P. Brown, who was a party to the original agreement of April 14th, 1884, between said Brown and the American Finance Company, and also the tripartite agreement of September 24th, 1884, which was made between T. P. Brown, the American Finance Company, and Israel B. Mason and F. B. Jillson, of Rhode Island.

The 9th article of the original contract provides: "Said party of the second part (the finance company) is to receive in consideration of the premises a commission or compensation of ten per

335 centum on the face or par value of the bonds and stock issued and to be issued by said railroad company and negotiated, the said ten per centum on said bonds being payable in said bonds at par or in the net cash proceeds of the sales thereof at its option and on said stock in said stock at par; such payments or deliveries to be made from time to time *pro rata* as any of said bonds shall be negotiated, sold, or otherwise used or disposed of."

Article ten provides:

"In addition to said ten per centum of stock hereinbefore agreed to be paid to said party of the second part (the finance company) as commission, there is to be appropriated and transferred to said party of the second part as hereinbefore mentioned in further consideration of the premises and of its undertaking to secure the mar-

keting of said bonds 45 per centum of the capital stock of said new company, the same to be issued and delivered to said party of the second part *pro rata* from time to time as said bonds or any of them shall be negotiated."

Before any money was raised by the finance company under this original agreement of September 14th the tripartite agreement of September 24th was entered into. This contract recites the original contract of April 14th, and provides in the 7th section thereof that there shall be paid "to said American Finance Company $80,000 thereof in full payment of all its claims for commission for negotiating said $800,000 of said bonds."

Under these contracts the $80,000 of bonds were actually delivered to the American Finance Company, either as payment in advance or as payment in fact, for services rendered under these contracts; and it appears from all the evidence in this case that
336 the finance company did in fact render important services to T. P. Brown under these agreements in the negotiating of said bonds and negotiating of loans, which enabled T. P. Brown to pay off the claims against the old Toledo & Indianapolis R. R. Co. and thereby secure possession and control of the bonds of said Toledo & Indianapolis Railroad Company which had been hypothecated to various parties to secure the claims for which said company was indebted.

These contracts were entered into for the very purpose of enabling T. P. Brown to pay off the indebtedness of said Toledo & Indianapolis Railroad Company, and to secure the bonds of that corporation the new and succeeding corporation, the Toledo, Columbus & Southern, was to issue new bonds, which were to be used as the means for negotiating loans for extending the road beyond Findlay and enabling Brown to pay off the old indebtedness of the Toledo & Indianapolis Railroad Company. The question of whether or not the conditions of these contracts had so far been performed by the American Finance Company as to entitle them to their compensation stipulated therein was substantially passed upon in the circuit court of the United States for the southern district of New York, in a suit removed to said court from the supreme court of the State of New York, in which T. P. Brown was plaintiff and The American Finance Company, The American Loan and Trust Company, and others were defendants.

Judge Wallace, in his opinion in that case, substantially affirmed the validity of those contracts and the right of the finance company to the 80 bonds in question. Although that case did not proceed to final decree (the opinion of Judge Wallace having been upon an interlocatory motion), the proceeding is nevertheless a prece-
337 dent and a high authority in this case, because the parties here are substantially the same parties that appeared in that case. The master, therefore, feels warranted in accepting Judge Wallace's opinion in that case as conclusive in this, and therefore finds and reports that under the evidence in this case the American Finance Company were rightfully in possession of the 80 bonds de-

livered, to wit, under the provision of the tripartite agreement above referred to.

The remaining question to be determined is whether the parties who received these bonds from the American Finance Company are in law *bona fide* holders and entitled to participate in the distribution of the proceeds of this sale. The master is of the opinion that these bonds being negotiable, transferable by delivery, the parties who held the same are not required to make any higher or better proof of title than mere possession in order to entitle them to share in the distribution of this fund. If their title is assailed the fact that they became holders of the same after notice or with knowledge of such circumstances as ought to put them upon inquiry as prudent men should be made to appear from the evidence by those who dispute their right to share in the proceeds of this sale. No such proof has been offered.

Some claim is made that because the full extent and character of the transaction by which the holders came into possession of these bonds were not given, therefore some suspicion attaches to their title as holders, and it is claimed also that the master should require full proof from such holders of all the circumstances under which they acquired title thereto, but the master does not concur in this claim,
and holds that for the purpose of this case the holders of the
338 bonds presenting the same are entitled to share in the distribution of the proceeds of this sale. A mere challenge of title without proof is not sufficient to put the holder to any further evidence of title than possession implies unless the bonds bear on their face such suspicious facts as should put the purchaser upon enquiry. Judge Burke claims in his argument that the title to the 27 bonds held by the American Loan and Trust Company as collateral security for the notes of James M. Ashley is invalid. When examined as a witness in this case, in reply to a question he distinctly stated that he did not dispute the title of the loan and trust company to those bonds, and the master does not find in the evidence or in the arguments submitted by Judge Burke in his brief any good and sufficient reason for finding that said title is in any way invalid. The loan and trust company received said bonds as collateral security without any notice of any dispute to their title and should share in the distribution of the proceeds of sale.

The master therefore finds and reports that the parties hereinbefore named are *bona fide* holders and owners of the bonds enumerated as held by them, and that they are entitled to share in the distribution of this fund upon the same basis as the other bonds secured by the mortgage foreclosed in this case. He files herewith all the evidence taken before him, marked Exhibits A, B, C, and D respectively.

By consent of counsel this report is made as of June, 1889. All of which is respectfully submitted.

A. J. RICKS,
Special Master.

339 Afterwards, to wit, on the 25th day of March, A. D. 1890, there was filed in the clerk's office of said court the following Exhibits "A," "B," and "C," etc., to wit:

In the United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY and Others, Defendants.
No. 195. In Equity.

Proceedings before A. J. Ricks, special master, under the several orders of reference made in this case, held at his office, in the city of Cleveland, Ohio, the seventh day of March, 1889, at ten o'clock a. m., pursuant to the notice to all the parties.

Appearances: Of counsel, Judge Stevenson Burke, for Burke and Hickox; Robert Ludlow Fowler appears under protest for the American Finance Company.

Statement by Moses R. Crow, of New York City, N. Y.

I desire on behalf of myself individually and of the parties that I represent, as shown by the papers filed in Toledo on the fifteenth day of February, 1889, in appearing here to-day to protest against this proceeding for the reason that the decree entered in this matter, the original decree, is erroneous and unauthorized both at law and in equity, as appears from the papers in the above-mentioned suit in the United State circuit court at Toledo, Ohio, in the office of the clerk of this court, included in the bill of complaint, the answer of the defendant railroad company and of the interests
340 of R. N. Hazard therein, and the mortgage by the Toledo, Columbus & Southern Railway Company on April 22, 1885, including also the agreement known as the tripartite agreement under which the said mortgage was made, which tripartite agreement was made September 24, 1884, by and between Theophilus P. Brown, the American Finance Company, and Mason and Jillson, of Providence, Rhode Island.

Also on the further ground that all proceedings taken in the suit filed by the American Loan & Trust Company and by the bill thereunder as based on all the papers and proceedings in this matter on file are wholly unauthorized, irregular, and void both at law and in equity.

And on the further ground that the order entered on the fourth day of February, 1889, purporting to confirm a certain sale had in this matter to Stevenson Burke and Charles Hickox is unauthorized and irregularly entered.

On the further ground that it was the distinct understanding, either on behalf of said Stevenson Burke individually or through his counsel, that the said master in reference to the hearing of the 4th of February, 1889, should not be heard until about the 15th or

20th of February, about which time, to wit, the 15th day of February, 1889, a certain intervening petition, the petition to set aside the alleged sale or set aside the said sale in this matter, was duly prepared and on file in the proceedings.

And under the further protest that this matter, if heard at all, should be heard under a separate and distinct proceeding so far as it relates to the title or ownership of the bonds instituted for that purpose and not by virtue of a reference.

And, saving these and all further and proper exceptions in the premises, I appear here to-day on behalf of myself as representing the stock equity of the entire stock of the Toledo, Columbus
341 & Southern Railway Company under and by virtue of certain assignments of the stock of said railroad company, of which record notice is hereby given to Stevenson Burke and Charles Hickox, and also as representing the various parties petitioners who filed their intervening petition on February 15, 1889, at the office of the clerk of this court in the above entitled matter.

And I desire to say in addition that if this matter is to be heard before the clerk I have no wish to retard it. If it is to be heard before the clerk sitting as master, we think that it would not be proper owing to the great expense we would be put to in bringing the witnesses here. If the master was to hear the evidence we might offer in New York city, if possible for the master to sit there in New York city, either at our expense or at the expense of somebody, we would rather have this heard there, on account of the witnesses that it would be almost impossible to produce here; some of them it would be absolutely impossible to produce here, and we would be greatly prejudiced if it closed without a chance to take the evidence of these parties.

I also desire to state that Joel W. Tyler, Esq., appears for me in this proceeding here to-day as representing me in the matter of counsel, subject to all the exceptions and objections and protests which I enter; I may as well put on the record here this fact. We claim—that is, myself and the parties I represent—that there was a distinct understanding and agreement on the part of Stevenson Burke, under which the hearing on February 4, 1889, was not to be forced upon us without due notice of same.

Robert Ludlow Fowler, the attorney on behalf of the American Finance Company, objects to all proceedings in the master's office before the master, and only appears by compulsion by reason of the petition filed by Judge Burke and Mr. Charles Hickox, in which they say that the American Finance Company claims to be
342 the owner of eighty bonds mentioned in the original complaint, and in which they pray that in the distribution of the fund arising from the sale of the property securing said bonds by this court that they (Judge Burke and Charles Hickox) may be adjudged to be the owners of said bonds, the grounds of the objection being—

1st. That there is no jurisdiction in the circuit court to try such contest in the master's office after decree of foreclosure, the bonds

being admitted to be the valid outstanding obligation of the railroad company secured by the mortgage, as appears by the bill of complaint.

And on the further ground that there is no contention on the part of the American Finance Company presented in the master's office in reference to the ownership of such eighty bonds.

And on the further ground that the decree entered June 23, 1887, does not refer such second intervening petition of Messrs. Burke and Hickox to the master.

And for further objection the American Finance Company makes reference to its original answer to such second intervening petition of Burke and Hickox.

Judge BURKE: I will put in evidence the agreement between the American Finance Company and Mr. Brown, dated the 14th day of April, 1884. It is in the pleadings, and I call attention to it as part of the evidence.

I then put in evidence the tripartite agreement, made the 24th of September, 1884, between Brown and the American Finance Company and Mason and Jillson.

I also put in evidence the contract between Israel D. Mason and F. G. Jillson and Mr. Charles Hickox and myself, dated the 16th day of December, 1886.

343 Mr. FOWLER: There is no objection to it, but the agreement is not in the record and should be proven in the regular course before the master.

Judge BURKE: It is here, and I suppose it is a correct copy of the contract.

Now, I will be sworn myself.

STEVENSON BURKE, being duly sworn, testified as follows:

I will say, then, that some time in March or April, I should say, following the date of this contract, Mr. Hickox and myself made full payment to Mason and Jillson, elected to pay the money before it was due, and made full payment to them of the amount coming to them under this contract, and we received from them the bonds specified in this contract, and which bonds we now have and have ever since held.

(By Mr. CROW:)

Q. Don't you want to state the amount?

A. It is specified here.

Q. It is not specified there what you absolutely paid them.

A. I can only say that we paid them every dollar specified on there, with the interest as specified thereon. Just what it amounted to I do not remember, but it was the whole amount. We received the bonds, and the contract was fully performed on our part to the satisfaction of these gentlemen. There was also $10,000 of these—the other note of $10,000 that Mr. Fowler is acquainted with, I suppose, fully—in the hands of the American Loan & Trust Company. I think it had been negotiated there perhaps by the American

Finance Company. I may be mistaken about that, but at all events we took that up also, and there were twenty bonds in the hands of that company as security for the $10,000, and with the accumulated interest upon that, whatever it was, we paid it and took up those bonds and held them, making in our possession at the present time and which I will exhibit to the master 713 of the bonds.

344 By the MASTER:

Q. Leaving 87 outstanding?

A. I do not know distinctly the number left out.

By Mr. CROW:

Q. 87 and 25. There were 800 and these 25 of the subsequent extension?

A. Yes; I think so.

Cross-examination by Mr. FOWLER:

Q. The 80 bonds referred to in your second intervening petition there were outside of the 713 bonds that you took?

A. No; the 713 bonds that I have spoken of, as I understand, Mr. Fowler, there has never been any contention about them at all. I never heard of any.

Q. You have not stated how you derived title to the 80 bonds claimed in your second intervening petition, have you?

A. I have shown the contracts, and I purpose to show the contract between Mr. Brown and ourselves by which we have purchased those 80 bonds.

Mr. FOWLER: I will reserve any further cross-examination until the paper relating to the 80 bonds is produced, as that is the only contention in which I am interested.

Judge BURKE: As far as Mr. Brown's title is concerned, we certainly have his title to the 80 bonds.

Q. Have you that paper in the city?

A. Yes, sir; I can bring it in here.

Cross-examination by Mr. CROW:

Q. Can you give the date of the payment to Mason and Jillson; you say it was March or April, 1887?

A. Yes; I should say March or April, 1887, that it was. I can get the exact date, of course, because I can refer to my books.

Q. I would like to be exact. You will get that so that I can have it?

A. I will try and bear it in mind.

345 Q. And that payment was made by the terms of the contract of December 16, 1886?

A. Oh, yes; we agreed to pay so much money and we did it. That is all there was about it.

Q. The contract speaks for itself on that point?

A. Yes, sir.

Q. And you did not take up those 713 bonds until you made this payment?

A. They were not delivered to us bodily until then.

Q. They were still in charge of Mason and Jillson until that time?

A. I do not know, sir. They sent them to us when we sent them the money. In whose charge they were I do not know.

Q. And you have since held the bonds?

A. Yes, sir.

Q. Mr. Burke, prior to the contract between yourself and Hickox and Mason and Jillson of December 16th you had been vice-president of the Columbus, Hocking Valley & Toledo road, had you not?

A. I believe so. I had been both president and vice-president.

Q. And as such vice-president did you not make an agreement with Mr. Brown, Theophilus P. Brown?

A. Any agreement I made of that kind is in writing and will show for itself. I do not remember whether I signed the agreement or whether Mr. Green signed it. My memory does not serve me in that respect.

Q. You signed it as vice-president?

A. That may be so. That is not in the record and if you have a copy it will show for itself.

Q. Just look at this and see (handing paper).

A. My memory does not serve me about it, but "Subject to approval of board." Yes; I think that I did sign that contract. I have not any doubt about it in my own mind. Of course, I could not compare that and say word for word it is a copy, but I suppose that is a copy. I have not any reason to suppose it is not a copy.

Q. Suppose I read this contract and then you can see if
346 there are any corrections to make?

Mr. FOWLER: Suppose we use that copy, subject to the right to use the original.

Mr. CROW: Yes; all we want to get is the substance.

Q. (Reading:) Memorandum of agreement between T. P. Brown, of Toledo, Ohio, and the Columbus, Hocking Valley & Toledo railway, made this 10th day of December, 1885." That is the correct date, ain't it?

A. I presume so.

Q. Before reading any further I would like to ask two questions (reading): "Whereas said Brown is the owner of about four hundred and thirty thousand dollars par value of said stock and of about six hundred and fifty thousand dollars of the bonds of said company." Did you understand that these were the 650 bonds which were pledged and then in the hands of Mason and Jillson collateral for those notes?

A. Do you mean did I understand it at that time?

Q. Yes.

A. I do not remember whether I did or not. I do not recall.

Q. Do you understand it now to be so?

A. I do not know, sir, what bonds he referred to in the statement. That I certainly could not say, but I assume it must have been

some of the bonds of this company as a matter of course; but just in whose hands he assumed they were, that of course I could not tell.

Q. All I want to get at is the fact whether you understand now, knowing the exact amount of bonds that were issued by the Toledo, Columbus & Southern, whether those 650 bonds are connected with the bonds that Mason and Jillson held under the contract of September 24, 1884?

A. Oh, I do not know that, of course. I don't know what bonds Mr. Brown at that time claimed to have. I can't say that. I have no other means of knowing than you have.

347 Q. Then I understand you to state that you signed this contract as the vice-president of the Columbus, Hocking Valley & Toledo Railway Company?

A. I said that; yes, sir.

Q. And the understanding where those particular bonds were or what they were and whether Brown had them, do I understand you to say you took his word in regard to them?

A. I presume I had as full understanding as he could give me at that time, sir. I do not remember distinctly now what that understanding was.

Q. Is there any way in which you can refresh you- recollection?

A. I certainly did understand that he was in debt and involved and the bonds were many of them pledged. The details of it I certainly do not remember. These things have come to me at various times and I cannot always tell when I get the information.

Q. How many bonds do you claim now, before the master, were issued by the Toledo, Columbus and Southern Railway Company?

A. Well, of course, I had not the most ample information upon that subject. I have never been an officer of the company nor even a director, and I can only say what I had from information. My information is that there were issued originally to Mr. Jillson when he bought the property in—bid the property in—800,000 of bonds, or to Mr. Brown, whoever they were issued; I think Mr. Jillson was the name made use of for himself and associates, and that afterwards there were twenty-five more issued for a mile and a quarter of road going into Toledo, and that those bonds were all issued for a consideration in some way, but I am not familiar with the details of that matter. However, I then understood that there were 200 bonds and both certified by the loan & trust company.

Q. That is, complainant in this suit?

A. Yes, sir; and that a portion of those, to the amount of somewhere from 80 to 90, was made use of during the time that White and Short and others were in charge of the property—were made use of as collateral security.

348 Mr. FOWLER: Make that 89 bonds.

Q. What property do you refer to in charge of White and Short?

A. The Toledo, Columbus & Southern railroad and the others, so far as I have any knowledge of, were never put into circulation, and yet I have no personal knowledge. I never have seen one of

those bonds in my life. I have never seen one of those taken up by the receiver, but from other people—Mr. Brown and Short and other people that are reasonably familiar with the facts. I have been led to believe that all the bonds have been taken up by the receiver by the common consent of the parties in interest, except the 825 that ought to be outstanding. I suppose them to be so, but, of course, I can only give it from information and belief.

Q. That being the fact, what do you understand now that the 650 bonds mentioned in this contract of a thousand dollars each were?

A. The 650 bonds? Why, I suppose they must have been part of the bonds that were outstanding.

Q. That is, of the 825?

A. If there were 825 outstanding at that time that would seem to be so, certainly. Whether there were or not I do not know.

By Mr. FOWLER:

Q. In any event they are part of the bonds that were bought from Mason and Jillson?

A. Well, I suppose so. Of course, that is only a matter of opinion; of course, our purchase would involve a certain part of the 650.

By Mr. CROW:

Q. Those mentioned in this agreement?

A. That would be plain enough, I should say.

Q. You take 713 bonds from Mason and Jillson and you leave only 112 outstanding. It must have included at least the largest portion of the 650.

A. Yes, I should think so.

Q. It must have included at least 537 of them.

349 A. It would look that way. I certainly see no fault in that reasoning.

—. Now, another question: "Whereas he has heretofore borrowed"—that is, Brown I suppose it means, because it says in the previous preamble: "Said Brown is the owner of about four hundred and thirty thousand dollars par value of said stock"—"Whereas he (that is, Brown) has heretofore borrowed upon the bonds of said company pledged by him the sum of three hundred and twenty-five thousand dollars and interest and has made other arrangements touching the bonds and stock of said company"—what bonds did you understand that to mean?

A. Well, of course a man cannot always be sure about his understanding of years ago, but I presume I understood more fully at that time that contract was made how long the bonds stood or how he claimed they already stood.

Q. How Brown claimed?

A. Yes; I don't think there is any doubt about that.

Q. Did not Brown state to you at that time that he had, in pursuance of the agreement of September 24, 1884, called the tripartite agreement here, borrowed $325,000 from Mason and Jillson on his notes and given 650 bonds as collateral security for the same?

A. I think Mr. Brown exhibited the contracts to me.

Q. That is, the September 24, 1884, contract?

A. I think he exhibited that, sir; at all events I was made acquainted with the contract and think that they were both exhibited to me.

Q. At the time this contract was made?

A. Either at that time or before; that is, I think that Mr. Brown or Judge Doyle, I think. I am pretty sure I had information about that.

Q. Who is Judge Doyle?

A. He is an attorney-at-law in Toledo and one of the directors of this company; was at that time.

Q. Which company?

A. The Toledo, Columbus & Southern.

Q. And is also counsel for you and attorney?

A. Yes, sir.

Q. In these various proceedings?

350 A. I find just the best lawyers I can, and he is one of them, so I got him.

Q. You consider him one of the best lawyers in Ohio, do you not?

A. Certainly. That is the general opinion about Judge Doyle.

Q. One of the sharpest and shrewdest counsel in this State?

A. I do not think he is a sharp man especially, or a shrewd man. I think he is a very honorable, high-minded man, and good lawyer.

Q. You consider him a good lawyer?

A. Yes; I consider him a very good lawyer. Yes; I think I can swear to that safely.

Q. "Whereas it is believed to be for the interest of the parties hereto to make such arrangements as to place the property in the hands and control of the Columbus, Hocking Valley and Toledo Railway Company." Will you explain that as a question?

A. Give a legal explanation of it?

Q. Yes. You are a lawyer?

A. I am not much of a lawyer myself.

Q. You are an admitted member of the bar?

A. I have been admitted to the bar.

Q. And practiced in the courts?

A. Yes; I occasionally practice; yes, sir.

Q. Will you give a legal explanation of that or a business explanation, either?

A. Of what particular part of that?

Q. "Whereas it is believed to be for the interest of the parties hereto to make such arrangements as to place the property in the hands and control of the Columbus, Hocking Valley & Toledo Railway Company."

A. I suppose the contract speaks for itself about as plainly as I can make it. And I will assume I drew the contract—I am not sure about that. If I did, I made it as plain as I could in the contract.

Q. Is that the only answer you desire to make to that question?

A. I do not know what other I can than that. He meant to put this property in the control of the Columbus, Hocking Valley
351 & Toledo Railway Company. That, I think, was the purpose of the Columbus, Hocking Valley & Toledo Railway Company.

Q. That property was what at that time; where did it run from and where to?

A. It was a railroad running from Toledo, Ohio, to Pomeroy, Ohio, by way of Columbus and the Hocking valley.

Q. And the defendant in this proceeding, The Toledo, Columbus & Southern railroad—The Toledo & Indianapolis, formerly so called—what was that and where was it then running?

A. That was a road commencing near Toledo, perhaps inside of the corporate limits, and at that time constructed, after a fashion, down to Findlay, and it was headed, to look at the mortgage they made—it was headed towards Columbus and the Hocking valley.

Q. That is the same district that the Columbus, Hocking Valley & Toledo road runs to?

A. Yes, sir.

Q. "That as soon as possible all the indebtedness of said Brown for which said bonds have been pledged, shall be taken up and cancelled, and said bonds retired and cancelled." I ask that as a question in regard to the bonds, and whether those are the bonds of Mason and Jillson.

A. Yes, sir.

Q. "And that all the stock of said company not at present owned by said Brown shall be taken and turned over to the Columbus, Hocking Valley and Toledo Railway Company or its nominee."

A. Yes, sir.

Q. That is correct, is it?

A. It may be.

Q. "That with the view of enabling said Brown to retire his said indebtedness and repossess himself of the stock and bonds held by him in said Toledo, Columbus and Southern Railway Company, the said last-named railroad company will make and execute its mortgage upon said railway line in the usual form, securing five hundred bonds of one thousand dollars each, drawing interest payable semi-annually at the rate of five per cent. per annum;
352 and that the payment of the interest and principal of said bonds shall be guaranteed by the Columbus, Hocking Valley and Toledo Railway Company."

A. Yes, sir.

Q. "That four hundred and sixty thousand dollars of said bonds, or so much thereof as may be necessary, shall be appropriated to the payment of the indebtedness of said Brown aforesaid and the residue of the said four hundred and sixty thousand dollars shall belong to said Brown unless said indebtedness shall be settled and cancelled or in some way retired for a less sum than three hundred and thirty-five thousand dollars." Do you know how that sum was arrived at, this $335,000?

A. I think, sir, it was the amount of these notes and perhaps the interest on them. That is the only recollection I have about it now.

Q. Which notes do you mean—the ones held by Mason and Jillson?

A. I mean the notes that were negotiated by the American Finance Company.

Q. Under the tripartite agreement?

A. Under the tripartite contract.

Q. And which at this date were held by Mason and Jillson—that is, December, 1885?

A. Well, and the American Loan & Trust Company; they held $10,000 of them. The others were supposed to be held by Mason and Jillson.

Q. The contract of September 24, 1884, known as the tripartite agreement, which Mr. Burke read and put in evidence, and the agreement or contract of April 14, 1887, which was made between the American Finance Company and Theophilus P. Brown, that was also put in evidence by Mr. Burke without objection here. Now, under that contract of September 24, 1884, Mr. Brown, according to the terms of it, had place the bonds alleged to have been issued by the Toledo, Columbus & Southern railway—or rather the railway was known at that time, September 24, 1884, as the
353 Toledo & Indianapolis railway, and perhaps it may yet for ought that has ever come to my knowledge—and the Toledo & Indianapolis railway was to do certain things, certain bonds to be issued, and certain bonds which were then issued others to be issued to take them up, to be placed as collateral to Brown's notes of $325,000, the bonds being placed at fifty cents on the dollar, that making the $650,000, as I understand it, which is mentioned in this contract, together with sixty-five bonds which were to go as a bonus to Mason and Jillson for making the loan to Brown. This last twenty bonds which had been in the American Loan and Trust Company are the bonds to-day which Judge Burke and Hickox claim to own in this matter. Is that correct, Mr. Burke?

A. We got our bonds from Mason and Jillson. Where they got them I do not know except what the contract shows.

Q. What the contract shows generally is according to this statement, isn't it, as I made it?

A. The court will have to interpret that.

Q. Is my statement correct or isn't it?

A. The contracts are before you and will show for themselves. You do not mean to ask me whether you state the contract correct?

Q. I only wanted to facilitate matters.

A. I do not think that would facilitate matters.

Q. Perhaps not. We will see further on.

A. I have found out myself that I did not understand papers correctly when I got to getting other people to state them.

Q. "The remaining forty thousand dollars of bonds shall be left in the treasury of the Toledo, Columbus and Southern Railroad Company as assets of the company." How did you arrive at the remaining forty thousand dollars of bonds?

A. I have not looked that over, but I should say there were 460 or 360, which is it?

Q. 650, I believe.

A. No, no. But those are the new bonds to be issued; that is what that means.

354 Q. That is, of the five hundred?

A. Yes; that don't mean the other bonds.

Q. The $335,000. Well, explain how you arrived at that amount.

A. I should think it came to this: Don't papers show there that Brown was to have 100 of the bonds and that 360 were to be used up to pay off the debts and putting the road upon its feet, and, of course, if you will add 360 and 100 and 40 would make 500.

Q. Now you are talking about bonds to be issued by the Toledo, Columbus & Southern to be guaranteed by the Columbus, Hocking Valley & Toledo?

A. Yes, sir.

Q. And not the 825 bonds?

A. Not at all.

Q. "If it shall be found necessary to sell said bonds in order to retire the indebtedness of said Brown he shall not be charged with a greater discount thereon than five per cent., amounting to not more than $17,500, but said bonds are to be sold for the highest price that can be obtained therefor"—that is, the five hundred bonds?

A. Yes; that is the amount required to be sold; not the whole 500.

Q. "Or the bonds themselves are to be used in the settlement and liquidation of such indebtedness."

"2. Said Brown shall assign and turn over to the Columbus, Hocking Valley & Toledo Railway Company as security, his contract with Am. Finance Company and Mason & Jillson covering sundry bonds and stocks." Under what contract was that? Was that the tripartite agreement, as they call it?

A. Yes, sir.

Q. That is the one of September 24, 1884?

A. If it speaks of only one, then it means that one; if it is both, then it is the two contracts.

Q. "Upon receiving the sum of fifteen thousand dollars in cash or notes to his satisfaction and upon the consummation of
355 the arrangement by the retirement of the bonds and the regaining of the possession and control of the stock of the said Toledo, Columbus & Southern Railroad Company all said stock and bonds shall be retired and cancelled, or, at the option of the purchaser, enough stock shall remain to equal the sum of six hundred thousand dollars, of which sum the purchaser shall have four hundred thousand and said Brown two hundred thousand dollars." Now, will you explain the basis on which you were dealing with Brown in making that clause in this contract?

A. I do not think I can add anything to what the contract says about that.

Q. Did you understand at that time that Brown was in a position to negotiate for and transfer the title to all this property?

A. I think I understand his relation to it.

Q. Brown's relation?

A. I think so.

Q. Will you explain that relation as you understood it?

A. Well, I would refer you to the contract of April 14, 1884, the contract of September 24, 1884, as his relation to the American Finance Company and to Mason and Jillson. I do not know that I can add to what the contracts provided.

Q. My question goes to Brown's relation to the Toledo, Columbus & Southern railroad and the finance company.

A. His interest in the road is specified in these contracts. They speak for themselves, and there is no use of my defining it.

Q. What did you understand to be Brown's relation to the railroad company?

A. I understood it to be just what it was.

Q. That is, what is stated in these contracts?

A. I think so. I do not know of any reason why I did not understand that.

Q. Was Brown an official of the railroad company at that time?

A. I do not remember, sir: I think he was general manager.

Q. And president?

356 A. Well, sir, you know I never was in the board and do not know a word about it. I do not think he was president. I think Mr. White was president, was he not?

Q. Was Mr. Brown ever president of the Toledo, Columbus & Southern?

A. I think not, sir. I do not know, sir; and I can only say I do not know.

By Mr. FOWLER:

Q. He was president of the Indianapolis road?

A. I really do not know anything about the matter who were or who were not officers.

By Mr. CROW:

Q. You know from these contracts, of course, that railroad property which you have mentioned as running from Toledo to Findlay, Ohio, and, as I understand it, projected, but not running from there to Columbus?

A. I said it was headed that way.

Q. Yes; headed that way. Was it at the time of the September 24, 1884, contract—that we will call the tripartite agreement?

A. Yes, sir.

Q. Known as the Toledo and Indianapolis railway?

A. Of course, we had nothing to do with it as early as that, and really I do not know anything about it, but in a general way that there was a road attempted to be built there. That is all I know about it.

Q. You understood the contracts?

A. At the time I made this agreement I did; yes, sir.

Q. I mean at the time you made this agreement?

A. That was the first time I had an understanding about it.

Q. Now, I will ask you, You have read the contract of April 14, 1884? You have it in evidence.

A. Yes; I have read it over several times.

Q. That specifies that the property is the Toledo & Indianapolis railway?

A. Yes, sir; but then that shows for itself.

357 Q. Now, also, the contract of September 24, 1884, sets forth the same facts?

A. Oh, yes.

Q. Represents the contract of April 14th?

A. It does; certainly. They are tied together as close as they can be, in my judgment.

Q. Yes; I think so too. Really the same contract?

A. The same. Well, they show for themselves. I think they are tied together, but, then, I may be mistaken; but that is a legal opinion.

Q. That is your legal opinion?

A. Yes; as you insist I am a lawyer, I will say that.

Q. Well, I want to get your opinion. We agreed on that point—"all said stock and bonds shall be retired and cancelled or, at the option of the purchaser, enough stock shall remain to equal the sum of six hundred thousand dollars, of which sum the purchaser shall have four hundred thousand and said Brown two hundred thousand dollars"—that is, the Toledo, Columbus & Southern—what I call the Toledo & Indianapolis, which road it is—their stock shall be fixed at $600,000, and the Columbus, Hocking Valley & Toledo shall have $400,000 and Theophilus P. Brown $200,000.

A. Well, I could not add to the expression made use of there.

Q. That is correct, as expressed here?

A. The contract was made, as I understood it, just as you have it there, and I could not add to that.

Q Did you not understand that $400,000 went to the Hocking Valley and $200,000 to Brown?

A. I don't think it is necessary to ask me whether I understood a contract that I signed. I don't think I am quite so big a fool that I did not. I think I understand anything that I sign.

Q. I did not mean that, Mr. Burke. What I wanted to get——

A. I am almost certain I understood that contract, and think it means what it says.

358 Q. "3. Said Brown, by his counsel or otherwise, shall proceed with as much diligence as possible to acquire possession of the bonds and stock aforesaid and to deliver the same to the purchaser for cancellation under this contract. The details of the reorganization, cancellation of bonds and stock, and the issue of new bonds and stock shall be such as shall be advised by counsel and reasonably adapted to the purpose of the complete reorganization of said Toledo, Columbus & Southern Railway Company upon the basis contemplated by this memorandum. Said Brown shall remain,

as at present, in charge of the affairs of said last-named railroad company"—I think you said he was manager of the Toledo, Columbus & Southern at this time, was he not?

A. I think he called himself general manager.

Q. —"until this arrangement is fully consummated and shall receive the salary which he is at present receiving, both parties to aid in every way possible to consummate the change contemplated herein as rapidly as possible. If said purchase shall be fully consummated said Brown shall own and retain said sum of $15,000 as part of the purchase-money, but if for any reason it shall fail to be carried out said sum of $15,000 shall be repaid to said railroad company with interest and the security held surrendered, subject to approval of board. Signed, The Columbus, Hocking Valley & Toledo R'y Co., by S. Burke, V. pres't; T. P. Brown," and then endorsed, "Approved by board of directors December 12th, 1885. W. M. Greene, sec'y C., H. V. & T. R'y." Who has represented you throughout the litigation known as the American Loan & Trust Company against the Toledo, Columbus & Southern railway in this suit?

A. Here, do you mean?

Q. Yes.

A. Why, Doyle & Scott, I suppose, while I have not represented myself.

359 Q. Who has represented the railway company?

A. Well, I do not know, sir; the papers will show. I suppose Doyle & Scott; I don't know. They are attorneys, I understand, of the railway company. I represent myself occasionally.

Q. Have you read the bill of complaint that was filed by the American Loan & Trust Company in the beginning of this suit?

A. Yes, sir. I have not very recently read it, and I presume I could not stand a cross-examination upon it, but I did read it once.

Q. That was filed, as I recollect, the 22nd day of April, 1886?

A. I do not remember about that.

Q. Judge Burke, will you please read that bill of complaint so that you can stand a cross-examination upon it?

A. What do you want to ask me about it?

Q. I want to ask you first in regard to the allegations of the bill of complaint regarding a certain alleged conspiracy by which the railroad company's property is alleged by the trust company at that time as being damaged.

A. Will you tell me what that has to do with these bonds and the ownership of them and the question we have before the commissioner?

Q. I prefer not to disclose exactly my point about that at this point of the proceeding.

A. I am willing to answer any question that I ought to answer. I object to the question. What has it to do with any question before the referee? I am willing to give you any information that I can give you in the world.

Mr. CROW: Mr. Burke has come in here and put in evidence himself, I can say somewhat to my surprise, certain contracts which

I proposed to put in evidence. What his object was in doing that I do not pretend to say; he has put them in evidence and he has submitted to an examination-in-chief, which he has made as his own statement, and he says he is a lawyer, which I believe he is, and a very good one, and in that he claims, pursuant to these contracts,
360 which speak for themselves, as he says and which I need not now enter into a discussion of except in a small way. He bought out from Mason and Jillson certain notes; the contracts show that Mason and Jillson held notes; the contracts show that the Toledo & Indianapolis railway was in existence when these papers were made, and for aught that has appeared here to-day the Toledo & Indianapolis road is still in existence pursuant to these papers; that is, the contract of September 24, 1881 and of April 14, 1884, and pursuant to the contracts specified distinctly in these agreements and which Mr. Burke has affirmed by his evidence away down in 1886 and to-day here in his cross-examination upon a contract which he makes between Brown, or, at least, the Columbus, Hocking Valley & Toledo railway corporation, formed and organized, which has been substituted and which these papers throughout name as the Toledo, Columbus & Southern railroad. It is organized, if at all, pursuant to these papers. If it issued any bonds legally it issued them based on these papers. If it made any mortgage, as alleged in the bill of complaint in this action, it made it based on these papers. If the decree under which we are proceeding in this action is worth the paper it is written on it relates back to the September 24, 1884 tripartite agreement, which he has put in evidence. Part of his case, part of his title to these bonds; that and the contract of April 14, 1884, which distinctly specifies what was done down to the day that the bill of complaint was filed by the American Loan & Trust Company in this matter, and that bill of complaint is, to my mind, the most extraordinary bill of complaint that ever a railroad was foreclosed under. If allowed, I venture that assertion. Of course, I am a much younger man than Judge Burke, but I have seen several hundreds foreclosed—that is indirectly. I have been interested in some myself. I desire to ask Mr. Burke, as the owner or claimant of 713 bonds, to which he is proving title through the
361 very contracts that I was going to put in evidence, but which he put in himself and which speak for themselves, I want to ask him to explain to me, if he can, after he has made this contract of December, 1885, with Mr. Brown, representing the Columbus, Hocking Valley & Toledo road, what these charges of fraud were that are complained of in the bill of complaint in this matter and upon which so large a part of the proceedings are founded and the decree of June 23, 1887, is entered. There was a supplemental bill filed by the trust company afterwards, but that bill and the decree both refer back to the original bill. I ask Mr. Burke to explain to me at this time, if he can, by any consistent reasoning that a man can give, what these charges of fraud mean and what there is in them, taken in connection with the answer of Mr. Brown and the railway company—the answer which was filed by Mr. Burke's own

counsel. As part of his examination I assume to cross-examine him, if I can, to show from this man, who knows more about this than I can hope to know, what that bill of complaint itself means in relation to those charges. Now, I think the bill of complaint and the claims of Mr. Burke makes that cross-examination relevant in this proceeding. If it don't, I am not entitled to it.

Judge BURKE: Let me ask you—you are a very good talker—let me ask you what evidence I put in here in chief that makes that cross-examination under this bill? What have I put in in chief that gives you a right to ask me to explain a bill filed by somebody else? I had no more to do with the filing of this bill than the Emperor of China. I did not know anything about it when it was filed. I never saw it until after it was filed; and the gentlemen you speak of as my attorneys, they were not my attorneys in this matter. You will bear in mind that I never even purchased the bonds or had anything to do with them until long after——

Q. Eight months after that was filed?

362 A. Yes, sir; and you cannot go back for knowledge; you may go ahead for it; but I never gave it any attention until then—I mean personal attention—at all; I was very actively engaged in business at that time, in 1886; I was the president at that time of the Bee Line here, giving my attention to it, and I was vice-president of the Columbus, Hocking Valley & Toledo, and was the acting president at that time, for Mr. Greene, I think, was away in Europe; at all events he was in poor health and I had to attend to it. I was connected with several other roads and many other corporations; I was not practicing law to speak of—that is to say, I was not giving my time to it—and I did not know any more about the affirmations that they put into this bill than any man who lived in China; I had no knowledge about it. When I purchased the bonds I then did give it some attention, and I say it is not cross-examination; it is no matter that I have called out in any way; I can tell you nothing about it; I have no knowledge of anything about it and it would be of no use to anybody.

Q. What I ask you is, to read the bill. You say you are not prepared for cross-examination.

A. I cannot do that to accommodate anybody; life is too short. I must object to spending time in this way for this purpose; I have not gone into the charges of this bill; I am willing to state anything in the world that I have had anything to do with, Mr. Crow; that you should ask me as much as you like about it, but you need not send me out to search for information among papers that I had nothing to do with or saw before. I could not tell you what somebody else means; that I must decline to do. Let us see if after all we differ so much on these things. You ask me about putting in those contracts?

Q. Yes, sir.

A. There is no fact in this case that I have any disposition to blink in any way, shape, or manner.

Objection sustained.

Adjourned until 2 o'clock p. m.

363 TWO O'CLOCK P. M.

Cross-examination of Judge BURKE resumed.

By Mr. CROW:

Q. In the decree mention is made of 89 bonds, and there has been some talk of what has become of the 89 bonds. I do not think it is on the record. Will you explain so it can go on the record what the 89 bonds were and what has become of them?

A. I can give no other explanation about the 89 bonds than what I have given, and I do not carry in my head the exact number. I know there were 20 bonds pledged to Colonel Lemmert.

Q. Who is he, a contractor?

A. He was the man who was getting the right of way.

Q. South of Findlay?

A. I do not know whether it was all south of Findlay or not; some of it was certainly; then the residue, whatever there might have been, were pledged in New York, 25 of them, I know, to the Ohio Central Terminal Company to secure rent, and the others were pledged to somebody that the American Finance Company or Mr. White had dealings with.

By Mr. FOWLER:

Q. Mr. White was president of the Toledo, Columbus and Southern railroad?

A. Yes, sir. I do not know the details of that. As I understand it, they have all been taken up.

By Mr. CROW:

Q. By whom?

A. By the receiver and paid by receiver's certificates issued or by income or both.

Q. You mean the receiver of the Toledo, Columbus & Southern?

A. Yes, sir.

Q. What is his name?

A. Mr. Ferris.

Q. Who is Mr. Ferris? What is he independent of receiver? Has he any other business?

A. He is a railway manager. He is the general manager of the Toledo & Ohio Central railway.

364 Q. Is that the same one that had the bonds pledged to the terminal company?

A. No, sir; the terminal was named after the road and it was a separate corporation.

Q. You controlled both of these corporations?

A. Well, the terminal company has ceased to have any existence, as I understand it, and the terminal property has all been turned over to the Toledo & Ohio Central railway and the bonds have been taken up. That cost this company nothing—the Toledo, Columbus & Southern. When I made a settlement and adjustment with the holders of those terminal bonds—in other words, bought

out the terminal company as part of the arrangement—they were turned over to the receiver, those bonds cancelling the indebtedness.

Q. The terminal bonds?

A. Not the terminal bonds; the 25 bonds.

Q. Which were pledged?

A. Yes, sir.

Q. You say when you made that?

A. I mean as president of the Toledo & Ohio Central railway.

Q. That is the road in which Ferris is now in office?

A. Yes, sir; instead of taking the bonds to myself I had them turned over to the receiver.

Q. Where does that road run from, Toledo to where?

A. It begins at Toledo and runs by way of Bucyrus down to the coal-vein field at or about Corning, and then from Bushe's Station, Hadley Junction, there is a line into Columbus. It is a coal road largely.

Q. Then if this road was completed to Columbus it would be a competitor of that road?

A. Of the Toledo & Ohio Central? Oh, to a certain extent it would.

Q. Now, Mr. Burke, do you before the master here question the title of Mr. Hazard's bonds or the bonds he holds?

A. I am not making any question about them either way; they do not belong to us.

365 Q. You do as to the finance bonds, as I understand?

A. Yes, sir. I have no interest in the question about Mr. Hazard's 25 or 27 bonds, whatever it may be.

Q. You have read the motion papers he filed here on the 15th of February?

A. I simply read the motion itself and the affidavit.

Q. Did you read the contract? Do you know of a contract between the Hocking Valley railroad—Shaw as president—and Mr. Hazard, in which Mr. Hazard bought those bonds?

A. No; I never saw it. Mr. Hazard told me about it.

Q. As I understand, you do not make any serious question about the title to those bonds which Hazard took under the contract?

A. I say we have nothing to do with them

Q. They do not affect you?

A. Do not affect me any.

Q. So far as I understand, if the master ascertains what they are he can report just where they do belong?

A. I can only say, as far as we are concerned, we do not own them, unless it is under the general clause of our contract, and that would be subject, I suppose, to any rights of Mr. Hazard. Now, without undertaking to say definitely about that, I can tell you just how those bonds got into Mr. Shaw's hands—of course, before getting into the hands of Mr. Hazard.

Q. I do not see any objection to my asking that.

A. It came about in this way: I had made a contract as vice-president of the Hocking road——

Q. That is this contract that I have read?

A. That is this contract that we have here and under that there was some money advanced to Mr. Brown——

Q. $15,000?

A. $15,000 at first and then $9,500——

Q. That made $24,500?

A. And then, subsequent to that, there was deposited and
366 expected to be obtained from the road $9,500 more of notes, but the receipts were not presented and interest was not paid, except $300 given to the trust company.

Q. When you speak of notes you mean the notes of Mason and Jillson?

A. Mason and Jillson; and Mr. Brown never in fact turned over to me nor to the Hocking Valley road the contract—tripartite contract—which is mentioned in his contract with——

Q. That is the one between Mason and Jillson, the finance company, and Brown?

A. Yes, sir; he never turned over that contract, as I remember, to the company. It always remained in his hands, so far as I have any knowledge, and had no conversation with me upon the subject as to his purpose in turning them over. Mr. Brown having pledged 27 of them at that time—I did not see them—of the bonds of this company, and having some stock that had been issued——

Q. What were those bonds issued for?

A. For expenses. He had those bonds and some stock——

Q. $22,500 of stock?

A. That I do not remember—and he asked me what he should do with them. I directed him to deposit them in the Central Trust Company, an entirely special deposit, and take their receipt. He did so and brought the receipt to me.

Q. Were they deposited on account of the Hocking Valley road?

A. No, sir; to Mr. Brown's personal credit; and then he brought the receipt to me and without any conversation which I am able to recall, and I am quite sure there was none on the subject as to the purpose for which they were turned over, and delivered to me the receipt, so that I came in possession thereby of the receipt good for the 27 bonds and the stock, whatever there was of it, and whilst nothing was said about them I suppose that they took the place of something that the road was to have as a security for the money that had been advanced to Brown.

367 Q. Which road?

A. The Hocking Valley. So when my successor was elected president of that company I turned that receipt over to him.

Q. Mr. Shaw?

A. Yes, sir. Now, that is precisely the way it occurred. There was no distinct agreement about it. They were not to be collateral, but simply the facts occurred in that way and his taking it for granted rather than for any bargain about it at all. I assumed they were where they belonged, and so I afterwards turned them over.

Q. And afterwards Hazard told you he bought them?

A. Afterwards Hazard told me he had purchased the contract and the bonds, whatever went with it. That is the extent of my knowledge upon that subject.

Q. You understood that he paid for the bonds and the stock $40,000?

A. That I do not know whether he told me or not. I think he did. Of course, all I know about it is what he told me.

Q. You understood, did you not, that Mr. Hazard took his title under and in pursuance of a contract made with the Hocking Valley, with Mr. Shaw?

A. Well, that was the general intimation; yes. I heard that, but that is all I know about it.

Q. Have you ever seen that contract?

A. No; I never saw it.

Q. But you understood so; the transfer was made under that?

A. Mr. Hazard told me so. Oh, the transfer was made long before that contract.

Q. I mean the transfer to Hazard.

A. Well, that I do not know about, but I assume that is so.

Q. The 89 bonds we have now explained. Were they all paid off by the receiver?

A. So far as I have any knowledge. I do not know of any more outstanding in that way.

Q. Were they cancelled?

A. No; the receiver holds them, I know, subject to the order of the court about it, to do whatever the court tells him.

368 Q. As receiver?

A. Yes, sir.

By the MASTER:

Q. As part of the assets of the receiver?

A. Yes, sir. An order has been made here from time to time about it right along. Mr. Fowler has one of the orders, I am sure.

Mr. FOWLER: Yes; I think there is no dispute about the 89 bonds.

A. I do not know of any. What I understand we do differ about practically is the construction of the contract by which the finance company claims to become the owner of the 80 bonds.

By Mr. CROW:

Q. Those 80 bonds that they got?

A. Yes; more than 80; 82 or '3. They had got two or three, I think three, at the time the extention bonds were issued.

Q. Independent?

A. Yes, sir.

Q. You have read the supplemental complaint in this foreclosure proceeding?

A. By whom?

Q. Filed by the American Loan & Trust Company.

A. No, sir; I do not think I have. I would not say I have not read it, because I have read so many legal papers.

Q. How long ago or when you do not recall?

A. I do not recall it this minute.

Q. Did you request the trust company to make the foreclosure?

A. Yes; Mr. Hickox and myself both made the request that they should proceed. Furthermore, we made election to treat the bonds as due under the contract—under the provisions of the contract?

Mr. CROW: Now, I do not know but there are some other points that I would like to go into with Mr. Burke, but I think Mr. Fowler had better finish his examination and I will reserve my right to further cross-examine. We shall probably have to adjourn this to New York.

Judge BURKE: I shall be opposed to adjourning it to New York. There is no reason why we cannot do our business here.

369 Cross-examination by Mr. FOWLER:

Q. Did you produce the contract under which you claim the 80 bonds referred to in your second intervening petition?

A. Do you mean our contract with Brown?

Q. Yes, sir.

A. That is, Brown's right of redemption in them?

Q. No, sir. How do you establish your title to the 80 bonds?

A. Of course we can show the referee we have the title of Mason and Jillson as pledgees, and whoever holds these bonds as security we then have the title of the pledgor. I assume that is all the title there is, and I have both titles.

Q. Will you please produce the contract?

A. I have a copy of it, between Mr. Hickox and myself on the one part and Mr. Brown on the other. I have only a copy that Mr. Hickox sent up from the office; the original is down in his office and I have a copy. I have, no doubt, a correct copy. It is the copy I have been relying on at all times.

Q. Supposing we use that.

A. Yes; it can be corrected if anybody questions it. By virtue of this contract we are owner- of these bonds.

Q. Is it under that contract that you claim the right to the 80 bonds?

A. Yes; under this contract; certainly. I will read it:

"Agreement between T. P. Brown of Toledo, Ohio, and Charles Hickox and Stevenson Burke, of Cleveland, Ohio, as follows: The said Brown is the owner of all the capital stock of the Toledo, Columbus & Southern Railway Co., and of all its bonds. Of the bonds issued about six hundred and ninety-three (693) are pledged to I. B. Mason and F. J. Jillson upon an indebtedness of said Brown to them jointly and severally as the case may be of $315,000 and interest from September 24, 1885, and said Mason & Jillson are entitled to a certain bonus of about 115 bonds as per a certain
370 contract between said Brown, Mason & Jillson and the American Finance Company, reference being had to said contract. Of the residue of said bonds outstanding about one hundred and two

are in the hands of the said American Finance Company without any right on their part to hold the same, but said company does hold said bonds and also holds a note of said Brown for $10,000, the legality and obligation of which said Brown is now contesting in the courts in New York. There are also about ninety of said bonds outstanding wrongfully issued by Francis A. White, late president of said railway company, and pledged as collateral for some pretended indebtedness of said railway company. The said finance company also holds without any lawful claim 7,993 shares of the stock in said company belonging to said Brown. Now in consideration of the premises and for value received said Brown hereby sells, assigns and transfers and turns over to said Charles Hickox and Stevenson Burke jointly and equally all of the bonds and stock aforesaid and all interest, title and ownership which he has or ought to have in or to said stock and bonds and all the stock and bonds of said railway company in the hands of said Mason & Jillson, the American Finance Company, or any other person or persons, or in his own possession or control.

In consideration of the premises said Hickox and Burke agree to take the title to said bonds and stock as it stands, to defend in the name of said Brown all suits in regard to the same and to save said Brown harmless from the said debt to Mason & Jillson and if they take up the notes held by them and each of them to cancel and deliver the same to said Brown. The litigation with the American Finance Company said Hickox and Burke shall carry on in their own way in the name of said Brown or otherwise, and acquire control of the bonds in their hands and if the note held by said finance company is paid or cancelled, deliver the note to said
371 Brown or the evidences of cancellation if cancelled by law. Said Brown will afford said Hickox and Burke all the aid he can in all litigation about any of the matters aforesaid and aid them in the case now pending in the United States court in the northern district of Ohio to foreclose the mortgage and sell out said railway. When said railway shall be sold out and the sale duly approved by the court and deed made to the purchaser or proper party, said Hickox and Burke will pay to said Brown one hundred thousand dollars at par in either the five per cent. consolidated bonds of the Columbus, Hocking Valley & Toledo Railway Company or the six per cent. joint bonds of the said C. H. V. & T. Railway Company and the Hocking Coal & R. R. Co., as he may elect, payment to be made at the office of said Burke in the city of Cleveland within five days after the election of said Brown as to which bonds he will take, and the execution and delivery of the deed of said railway under sale. It being understood that Hon. J. H. Doyle will have charge of the foreclosure of the mortgage and sale of railway under the direction of said Burke and Hickox.

Toledo, Dec. 15, 1886.

(Signed) T. P. BROWN,
CHARLES HICKOX,
STEVENSON BURKE."

By Mr. CROW:

Q. Was that the real date on which that contract was made?

A. The contract, as I understand it, was closed on the evening of the 15th and the contract with Mason and Jillson was closed the next day.

Q. That is, the 16th of December, 1886?

A. Yes; and this was closed the evening before.

Q. The 15th?

A. The 15th.

Q. 1886?

A. Yes, sir; but whether it was delivered the evening before or the next day I cannot tell you. My memory don't serve me how soon. I can only say there was no attempt to make a wrong date about it.

372 By Mr. FOWLER:

Q. Was this contract ever carried out?

A. Yes, sir; it has been fully carried out, with the exception there is something more to be paid to Mr. Brown. The mode of payment was afterwards changed—that is to say, the bonds were fluctuating in the market, and as we could not make delivery of them Mr. Brown preferred to make the sum definite in money, and a portion of that has been paid and portion remains unpaid, is the form of it.

Q. Will you be kind enough to state precisely the consideration you paid Mr. T. P. Brown for the interest which you claim to have acquired from him?

A. The contract truly states it, only we changed that by fixing a cash value on the bonds afterwards, inasmuch as we were unwilling, of course, to settle up upon any other basis than the basis provided in the contract—at that time provided in the contract—so we mutually agreed upon a cash sum to take the place of the bonds; but that was the true consideration, sir.

Q. Was the cash consideration less than the par value of the bonds?

A. Yes, sir.

Q. Do you mind stating whether it was considerably less?

A. It was $20,000 less, as I remember it, sir, and was the true value of the bonds in the market, as I remember, at the time that the modification occurred.

Q. So that you and Mr. Hickox really paid on joint account substantially the sum of $80,000 to Mr. T. P. Brown?

A. Paid and are to pay—yes, sir.

Q. Paid and are to pay?

A. Yes, sir.

Q. For all his interest, all his equity in the Toledo, Columbus & Southern bonds?

A. The costs of law, the expenses we had, attorneys' fees, and one thing and another, and you can discover there we paid
373 him just as that contract provides; just exactly, and we took the thing with its burdens. I did not think it a good con-

tract then, and I voluntarily gave up a quarter of it afterwards; sold a quarter of my interest there upon the ground that I did not think it was worth any more than I paid for it, or I certainly would not have done so if I thought it was worth more.

Q. You speak of having disposed of a quarter of your interest. To whom?

A. Mr. Charles Hickox has that quarter of my interest, and he sold a quarter to Mr. Charles G. Hickox, so that he became the owner.

Q. Does he make a claim on the bonds?

A. He claims with us; makes the same claim we do.

By Mr. CROW:

Q. Who is Charles G. Hickox?

A. That gentleman over there.

Q. What relation is he to Charles Hickox?

A. His son.

Q. Mr. Charles Hickox, the father, and not Charles G., is the party mentioned in the contract with you?

A. Yes, sir.

By Mr. FOWLER:

Q. I notice Charles G. Hickox did not sign this so called second intervening petition which was filed October 24, 1888.

A. Then I have no doubt he had an interest, but then he has only an interest from us—that is, we are now accountable to him for so much; the contract is in our name.

Q. You have got to fight the interest through and get it first?

A. Yes, sir; the contract is in our name.

Q. At the time that you entered into this last agreement with Brown did you know that the 80 bonds were then claimed by the American Finance Company?

A. I have no doubt I did, sir. I think the contract recites that.

Q. Did you ever enquire of the American Finance Company what their claim was in respect to the 80 bonds?

A. I have made enquiry myself and heard enquiry made.
374 I heard Mr. Short swear to that. I can turn to his evidence here, but I heard that point. I happened to be present.

Q. Was his evidence prior to making this contract?

A. Yes, sir.

Q. And prior to making the purchase of T. P. Brown?

A. That I do not know; I think not, sir.

Q. That is, December 15, 1886?

A. No, sir; I do not think it was. I do not think his evidence was prior to that, but I read the contract, and, although I do not think I had heard Mr. Short, I did know in a general way.

By Mr. CROW:

Q. You knew the tripartite agreement that you made this contract?

A. I certainly did.

By Mr. FOWLER:

Q. Who drew this contract with T. P. Brown?

A. I think Judge Doyle drew it; that is my impression about it. I know he was present, and either Judge Doyle or myself did it. I think it was Judge Doyle.

Q. There is a letter from you to Short, April 1, 1886. Is that a correct copy of a letter which you sent to the American Finance Company on the date that it bears?

A. Yes, sir; I suppose so. I have read it over. I never compared it, but then in a general way I should say so.

Q. You are now reading from a book which was printed and paid for by you?

A. I do not know who paid for it. I suppose we did. I suppose it must have been in our bill.

Q. That is presumably a correct copy of your letter?

A. Yes, sir; I presume it is.

Q. Let me observe that the letter is dated considerably prior to this contract with T. P. Brown on December 15, 1886.

A. Yes, sir; I observe that.

375 Q. And it states that you were then the owner of all the bonds theretofore owned by T. P. Brown?

A. Yes, sir.

Q. I suggest that this letter be read and that the stenographer take it down.

"Fifth Avenue hotel, Madison Square, New York.

NEW YORK, *April* 1, 1886.

American Finance Company, 4 Pine St., New York.

GENTLEMEN: I am informed that you have in your control or possession the whole or some part of 800 bonds of the Toledo, Columbus & Southern Railroad Company. I have purchased from T. P. Brown, of Toledo, Ohio, all his interest in and title to said bonds, and I now own said bonds. As I am informed, you have no legal right to retain or hold said bonds, or any part thereof, and I therefore demand them or such of them as you hold or control to be forthwith delivered to me, and I will hold you responsible for their value and safety. You can address me at Cleveland, Ohio.

Very truly yours,

(Signed) STEVENSON BURKE."

Is that letter entirely accurate as to its statements and facts?

A. Well, what do you mean by that?

Q. I mean simply, sir, to ask you whether it states a fact that you owned, then, at the date of that letter, the whole of the 800 bonds.

A. Well, I had an assignment from Mr. Brown of the bonds at that time, of all of them and of all of his rights. I am inclined to think it was given up to him. The arrangement under which I was to get them at that time was never carried out in full.

Q. Was it in writing?

A. The assignment was in writing; yes, sir.

Q. I ask you to produce that.

A. Well, I do not think I can. I think it was destroyed, but I am not so positive about it. The agreement at that time in
376 contemplation came to nothing when we finally consummated this agreement, Mr. Hickox joining in the purchase, which he did upon going to Toledo and looking up the matter. Prior to that time whatever had been done about it was a personal matter of my own which he had nothing to do with.

Q. And then, Judge Burke, there must have been other writings between yourself, T. P. Brown, and perhaps Mr. Hickox, than these you have now produced?

A. I do not remember any that had any bearing, Mr. Fowler, upon this subject. The assignment which he made to me of his interest in the bonds I do not remember whether it was formally cancelled or not, and it is barely possible that I have it yet. In fact, it has been cancelled and superceded, you understand.

Q. By this instrument?

A. By this new arrangement, so that I never did anything under it except to write this letter.

Q. As this letter marks an important fact in your claim to the bonds which were heretofore in the possession of the American Finance Company, I shall have to ask you to produce that contract, if you can, at the next hearing.

A. It was not a contract, sir; it was an assignment. Mr. Brown assigned to me his interest in a short paper, perhaps half a page, and the transaction remained in that way, I think, up to the time that we met in Toledo and Mr. Hickox concluded to go into the purchase of this property jointly, and he went too for that purpose.

By Mr. Crow:

Q. That arrangement was verbal under which that written assignment was made?

A. There was no agreement reduced to writing.

Q. But there was a verbal agreement?

A. Yes; there was an understanding under which that was made turning it over to me, and, as there never was any action taken under it, I never gave it any special place in my memory.

377 By Mr. Fowler:

Q. And until it was superceded you regarded it as binding as far as Brown was concerned?

A. I certainly did, the assignment from him of his interest.

Q. You considered it as sufficiently binding to make you make this statement of it contained in your letter of April 1, 1886, that you were the owner?

A. It certainly was binding; no doubt about that.

Q. Will you be kind enough to state whether the suit that was brought by Mr. T. P. Brown in the city of New York was brought after the date of this letter of April 1, 1886?

A. I do not remember, sir. Perhaps the book there will show.

Q. It was brought on February 13, 1886.

A. That would have been my impression, Mr. Fowler, but I cannot dispute dates that are long ago, unless I have some special reason for recollecting them.

Q. You may look at the summons in this book which I hand you and state whether that correctly states the date of the institution of the suit.

A. I can only say I suppose so, sir. I have no personal knowledge, you understand, about the exact date. I think Judge Doyle went to New York with Mr. Brown when the suit was commenced, and was there and looked after it with Col. Burton Harrison, whom you know.

Q. Yes, sir.

A. And I do not remember really that I participated in looking after that at all at that time.

Mr. CROW: Did you get the date of payment by Mr. Burke to Mason & Jillson?

A. I think it was in March.

Mr. HICKOX: About the 28th of March, 1887.

Q. When did you cease to be a director of the Hocking Valley railroad?

A. At the January election, 1887; two years ago, I think, the 10th or 11th of January.

378 By Mr. CROW:

Q. Of January of this year?

A. Yes, sir.

By Mr. FOWLER:

Q. Are you able to state from your recollection without the production of the assignment that you refer to how soon after that you entered into the arrangement, whatever it was, with T. P. Brown?

A. Well, of course these papers show the exact date as they were made.

Q. No, sir; because you did not produce the assignment from T. P. Brown.

A. Oh, I should think the assignment of the bonds bore the same date as that letter. It might have borne a date a few days earlier.

Q. Then it was about April 1st?

A. Yes, sir.

Q. April 1, 1886?

A. Yes—no; let me see; 1886 (considering).

Q. That is the date of the letter?

A. Yes; well, then, I do not understand your question.

Q. (Question read by stenographer.)

A. The assignment that was made by Mr. Brown undoubtedly was about the 1st of April, about the date of that letter.

Q. What was the consideration of that assignment, sir?

A. It was a consideration to be performed that was ultimately

dropped between us; certain things were to be carried out, the details of which are not altogether fresh in my mind, but which were to be carried out, and it was ultimately dropped between us, so that it came to nothing ultimately; never did take effect.

Q. Do you mean to state that you ceased to be the owner of the bonds some time prior to the making of this contract?

A. Yes; I should think the whole thing was dropped some time before the making of that contract except in a verbal way; that we talked about an arrangement that ultimately resulted in that contract.

379 Q. When did you first learn of the suit of T. P. Brown against the American Finance Company and Mason and Jillson in the city of New York?

A. Undoubtedly from the time it was commenced. I conferred with Mr. Brown about bringing the suit. I knew it was to be brought before it was brought.

By Mr. CROW:

Q. Who was Mr. Brown's counsel?

A. Judge Doyle.

Q. Of the firm of Doyle & Scott?

A. Yes, sir; and Burton Harrison, of New York.

Q. February 13, 1886, conferred with Brown before it was brought?

A. Before this suit was brought—certainly.

By Mr. FOWLER:

Q. What contracts between Brown and yourself—of any of these contracts which you have given in evidence—were in force at the time of this suit, February 13, 1886?

A. I do not think we had any contracts with Mr. Brown, any personal contract with Mr. Brown at that time—at any other time. I do not know of any; I do not recall any.

Q. Isn't it true that this suit which was instituted in New York on the 13th of February, 1886, was brought in furtherance of that contract—that is, the contract of the Hocking Valley with Brown?

A. The suit was brought practically because Brown claimed that he had a good right to have the notes cancelled and have the bonds delivered to him, as the transaction was usurious.

By Mr. CROW:

Q. Which transaction is that, with Mason and Jillson?

A. Yes, and the American Finance Company; and he claimed he had the right to have a cancellation of his indebtedness. I suppose he knew something about the law of New York on that subject. I was inclined to take that view of it, but when they came to take the evidence and proved the contract was made in Rhode

380 Island and that therefore it was not governed by the law of the State of New York, so that there was a misunderstanding. The notes bore date in New York.

By Mr. FOWLER:

Q. And you were consulted about the institution of that suit by Brown?

A. I do not think—I should think I charged him no fee as a lawyer, but I was consulted about the fact. Yes.

Q. There was a bond required of T. P. Brown as a condition precedent to procuring an injunction?

A. Yes, sir; I helped him procure that bail.

Q. You helped him?

A. Yes, sir.

Q. Isn't it true that you helped him procure and procured H. A. V. Post and Charles G. Pomeroy to furnish undertaking for T. P. Brown?

A. Yes, sir.

Q. And that is the undertaking upon which Mr. Brown procured the injunction?

A. Which I understand.

Q. That tied up all these securities of Mason and Jillson?

A. Yes, sir.

Q. And the American Finance Company until it was dissolved?

A. Yes, sir. I would do it again under the same circumstances.

Q. What do you mean by the same circumstances?

A. By the facts as they were made known to me and explained by Mr. Brown and which I supposed to be correct.

By Mr. CROW:

Q. You and Mr. Brown were consulting off and on all through this matter, weren't you?

A. If you mean by that to change our position once in awhile that undoubtedly is true.

By Mr. FOWLER:

Q. Then I understand the fact to be that on the 10th day of December, 1885, Mr. Brown entered into the arrangement with
381 the Columbus & Hocking Valley railroad, and on the 1st day of April, 1886, he assigned his rights, whatever they were, to you and to Mr. Hickox?

A. No; not to Mr. Hickox.

Q. To you personally?

A. He had nothing at all to do with it.

Q. And that on the 13th of February, 1886, the action in New York was instituted?

A. I suppose that is correct, sir; it is so far as I know.

By Mr. CROW:

Q. Did the court in New York decide that Mason and Jillson's contract was not usurious—that is, the tripartite contract?

A. I do not remember; I have got their decision; it will show for itself.

Q. It was to that effect, was it not? They upheld the contract?

A. As I understand it the court substantially upheld it—that is to say, they refused the injunction when they came to get to it. That is as far as the court went. What reason they gave for it I do not remember. Sometimes courts give good judgments and bad reasons or good reasons and bad judgments; sometimes they unite in both good reasons and judgments.

By Mr. LUDLOW FOWLER:

Q. At any time between the 1st of April, 1886, and the 15th of December, 1886, could T. P. Brown have assigned the bonds or his interest in the bonds of the Toledo, Columbus and Southern or whatever it might have been to any other person than yourself?

A. Do you mean between the date of the assignment——

Q. Yes.

A. I think he could, sir; I think he could. I could not tell you the exact date, either, but the matter between us was practically dropped soon after it commenced. I think he could. I do not know of any reason now why he could not.

382 Q. The assignment itself would show?

A. Well, the assignment was absolute; simply an absolute transfer to me, he relying upon the fact that certain things we were talking about would be carried out, but I could not give the details as to how the matter stood. He was anxious at that time to have the contract with the Hocking road carried out, as you understand, and being president of the company at that time would have been glad to carry it out if we could. The only trouble was the matter of disposing of all the litigation and he did not feel like waiving that and getting the money to pay obligations. You remember they ran along until somewhat late. I do not remember just when the court disposed of it—the April before '87, did it not?

Q. I do not know, sir.

A. The paper will show for itself; but I say that ran along in that way, and whilst we were confident of being able to cancel that obligation by law we were not prepared to take up and grapple with the question, as you can see, of raising the money. Moreover, this litigation was commenced here in 1886, because after Brown commenced litigation down East the finance company and the loan & trust company commenced their litigation here, you know, and Mason and Jillson; and Mason and Jillson employed lawyers and Mr. Hickok and myself finally paid them.

By Mr. CROW:

Q. Do you mean the lawyers in this very suit, The American Loan & Trust Company against The Toledo, Columbus & Southern?

A. Yes, sir.

Q. That is the suit pending?

A. We advanced the money at Toledo for Bowman and Harrison for Mason and Jillson.

By Mr. FOWLER:

Q. That is, you did that under your contract with Mason and Jillson?

A. Yes, sir.

Q. Whatever it was, and that contract is in evidence?

383 A. Yes, sir; been read here; and you can see how that litigation found things down there and just what we went through here. It was utterly impossible to go on with the Hocking contract whilst that litigation was existing, and I did not go on. I was anxious to go on and carry that out, but after my successor came in he was opposed to carrying it out.

Latter part of answer objected to and motion made to strike from record.

Judge BURKE: You may strike it off if you like. Shaw attended to everything except signing the contract, but never took a step to carry it out. I wanted it carried out and I made it because I wanted it carried out.

Q. Besides procuring bonds for Brown in the New York suit by which he was enabled to secure an injunction from Judge Donohue, did you do anything else, such as employing counsel?

A. I retained Col. Harrison, I have no doubt, a gentleman with whom I am acquainted and had a kindly feeling toward, and I do not recall now anything else; I may have done something else.

Q. May I ask you who paid Col. Harrison for his services in the suit?

A. You will observe by the contract that myself and Mr. Hickox were to pay for it.

Q. That is the contract of December 15th?

A. Yes; the contract of December 15th. Under that contract we have paid him. We have tried thus far to keep all our contracts, good or bad.

Q. Do you know whether a motion was made in the New York suit to dissolve the injunction which was granted by Judge Donohue, restraining the American Finance Company from parting with the bonds *pendente lite*?

A. I do not think—I never read the injunction, but I did understand, Mr. Fowler, that when there was a hearing to make the injunction permanent pending the litigation that Judge Wal-

384 lace refused—overruled Col. Harison's motion in that respect; but that simply comes to me by information.

Q. Have you ever read the decision of Judge Wallace upon that motion?

A. I think I have, sir; yes; I think so.

Q. Are you aware that in the course of his decision he decides that upon all the evidence that was before him at that time that the right of the American Finance Company to the 80 bonds is clear?

A. He says something of that kind. He did not say "clear," I guess, but he certainly intimates that that is his view of it; but one certain English judge was quoted, and I differ with Mr. Wallace on

that point, and his opinion shows that he was not familiar with the evidence.

Q. Are you willing to modify your last remark by stating that it may be possible that the record before Judge Wallace entirely justified his finding?

A. I shall always say it is possible that everything may be justified on a legal basis, but I think he is wrong, clearly wrong, about it; palpably wrong.

By Mr. CROW:

Q. It was after the injunction procured and granted in the way in which you state that you acquired the rights of Mason and Jillson?

A. Well, we acquired it when the contract shows.

Q. The date of the contract with Mason and Jillson show- that?

A. The date will show whether it was before or after the date of December 15, 1886. There is no use repeating it over and over again. The dates show that, and there is no use in spinning over any of these propositions. We stand in Brown's shoes to-day. We do not claim any higher rights than Brown had, and I do not suppose the finance company claims any higher rights than they get by virtue of this contract.

By Mr. FOWLER:

385 Q. Then I understand your position is that any right you have to the 80 bonds is shown by the contract you have offered in evidence?

A. Certainly.

Q. But you do not now produce the bonds before the master?

A. I do produce them.

Q. Not the 80?

A. That 80 we can't produce; you have got —; the papers will show. The answer of the finance company shows that they have got 49 or 50 of them, so on to the end, and Mr. Short himself claims to have 13, and somebody else—Hazard—has got the others that came out of other matter. The others, of course, that have got them—they are in the hands of these people that came in, and so they have got to show they own them, and they own them by virtue of these contracts, if they own them at all; if we own them, we own them by virtue of the contracts.

Q. So that what you want the master to do is to virtually construe the contracts?

A. I want him to decide the bonds ours.

Q. Under the contracts?

A. And direct you people to hand them over.

Q. Under the contracts?

A. Under the contracts and the ownership that we have acquired; certainly. We claim the right to have them if Brown were a party here and he could have them, because we stand in Brown's shoes, and that is all we claim; if he did not own them, we do not own them.

By Mr. CROW:

Q. If he deeded away his right, then you are out of court?

A. Yes; certainly; of course we are. If he did not deed it away, then we are in court.

By Mr. FOWLER:

Q. During your administration of the Hocking Valley railroad was there any contract between T. P. Brown and the Hocking Valley abrogating the contract which you have read in evidence between the Hocking Valley and T. P. Brown?

A. No, sir; not during that time.

386 Q. I want to ask you to produce, if you possibly can, at the next hearing the assignment which you have testified to between T. P. Brown and yourself, bearing date about April 1, 1886, and upon which you based the letter which has been read.

A. Well, I say if I can produce that I will; I do not know whether it is destroyed or not.

Q. If it is destroyed, then we will know what to do next; if it is not destroyed I would like to see it.

A. It says that in effect.

Q. It was in writing?

A. Yes, sir.

Q. And under seal?

A. Now, you have got me; I do not know about that; I do not know whether it is under seal or not.

Recross-examination by Mr. CROW:

Q. Mr. Burke, you have read the mortgage that was made by the Toledo, Columbus & Southern railroad April 22, 1885?

A. I think not, sir.

Q. Well, that is the mortgage under which the foreclosure is brought?

A. Yes; I know that, but I have never given any attention to that as far as I know.

Q. That mortgage was made by the Toledo, Columbus & Southern Railroad Company to the American Loan & Trust Company?

A. That is as I understand it.

Q. That is the same mortgage that is provided for in the tripartite agreement?

A. I suppose that is the mortgage that was made in fulfillment of what was provided in the tripartite agreement.

Q. Of September, 24, 1884?

A. Yes, sir; I suppose so.

Q. I was only getting your understanding about that.

A. I never read the mortgage, I am quite sure.

Q. I think I will read that mortgage.

A. Wait until you get to your side of the case.

387 Q. The tripartite agreement of September 24, 1884, provided that they should organize a corporation. Did you

understand that the Toledo, Columbus & Southern was the corporation organized in pursuance of that?

A. From general information I suppose that is so; I do not know anything about it; I suppose that is so.

Q. (Reciting mortgage.) Did you understand that the mortgage was issued for that purpose?

A. I do not know whether I did or not; I am willing you shall have it either way—whichever way you like; my memory don't serve me.

Q. Now, in regard to the bonds that were issued under the mortgage——

A. I say, Mr. Crow, I never took any interest personally in these proceedings to foreclose this mortgage, I think, until after the decree of foreclosure—not enough interest in it even to read the papers; I am quite sure I never did. It is barely possible that I saw some of the papers earlier, because my law partner was engaged in it, but I had nothing to do in it.

Q. You did take a pretty active interest in it after that?

A. No, sir; only occasionally I have had something to do with it. Since we became interested so largely in the property, of course we would naturally feel some interest in it after that—after Mr. Hickox and I purchased.

Q. But you fell too finally and used the foreclosure and got title to the property?

A. Yes; after that was done we wanted the property to go on as before, and those who had been praising it up to that time then held back in the harness because of the change of ownership; I do not know why they did, but they did.

Q. Can't you think of any reason why they did?

A. Yes; a man can think of lots of reasons sometimes, but they never gave me any reasons, and you might suspect all the reasons you please, you know; but I would not like to be censorious in my suspicions at all.

388 CHARLES HICKOX, being duly sworn, testified as follows:

(By Judge BURKE:)

Q. You have heard this contract read here since you came in, touching the purchase of the bonds and stock from Mr. Brown; did you hear it read?

A. I did.

Q. Do you remember the circumstances of our making that purchase?

A. I do.

Q. You may state whether we have fulfilled our contract with Mason and Jillson and acquired the bonds.

A. We have.

Q. And do you remember what time we sent the money on?

A. I do not remember that, but can easily find out by referring to the books, but it was suggested here in March, and I do not remember anything different from that.

By Mr. CROW:

Q. March, 1887?

A. Yes, sir; I cannot locate the time.

By Judge BURKE:

Q. You say your memory is not different from that?

A. No, sir; I cannot remember different. I do not say that that is right, but I say I do not remember.

Q. There were but two payments made, one of interest and, afterwards, one of principal. Do you remember about that?

A. Yes, sir; interest and principal.

Q. Both of them were made shortly after we purchased the property, were they?

A. Yes, sir; not long after.

Q. The bonds that you have are still where you can exhibit them, are they?

A. Yes, sir.

Judge BURKE: We will exhibit those bonds to the master at any time.

Mr. FOWLER: It might inconvenience you to produce the bonds, and you better file a list of the numbers with the master.

Cross-examination by Mr. CROW:

Q. In this matter you have acted with Judge Burke, have
389 you not; he has taken the lead in acting?

A. Yes; under his supervision mainly.

Q. He is your counsel?

A. Partly.

Q. And you and Judge Burke bought off this property at the foreclosure sale, did you not?

A. Yes, sir.

Q. For how much?

A. $600,000.

Q. And the amount of bonds outstanding, as I understand from the decree, is $825,000?

A. $825,000, I think, is right.

Q. Well, you have heard Mr. Burke's testimony here to-day and substantially you corroborate his testimony?

A. Yes, sir; as far as I know of.

Q. I mean as far as you have heard it.

A. So far as I heard it.

By Judge BURKE:

Q. At the time that Mr. Brown made an assignment to me of some bonds, a long time before you were interested in the purchase, did you know anything about that at the time?

A. No, sir.

Q. I did not think you did.

A. I did not know anything about it.

Mr. CROW: Under this order of the court and decree that has been entered you have the right to turn in your bonds.

Judge BURKE: Yes; I suppose so.

Mr. CROW: These bonds you got from Mason and Jillson?

Judge BURKE: Yes; only we are subject to all the rest of the bonds to make payment precisely as the court shall order; if we do not do it the court reserves the right to set it aside.

Mr. CROW: *Pro rata* on the amount of the sale?

Judge BURKE: There is no *pro rata* about it.

Mr. CROW: What does the decree provide?

Judge BURKE: You need not ask me what the decree provides.

390 Mr. CROW: You knew about the railroad company having issued stock, too, do you not? You have testified about the stock.

Judge BURKE: Well, I heard they did.

Judge BURKE: I put in the entire record so far as they have anything to do with the case; all the papers that bear upon this subject.

Mr. CROW: I would like to ask if that includes the bill of complaint, supplemental bill, and the answer.

Judge BURKE: No; they do not pertain to this case at all.

Judge BURKE: And I put in a portion of this deposition of Short, you have got it on file here in the printed record, and I refer to the part beginning on page 239, and I do that to accommodate Mr. Fowler (as follows):

Q. Referring now to the paragraph of Exhibit No. 2 which you have mentioned, when did the American Finance Company become entitled to commission for negotiating the $800,000 of bonds there mentioned?

A. By the terms of article 9 of Exhibit No. 1 it is provided that the American Finance Company shall receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by said railroad companies and negotiated, said ten per centum on said bonds being payable in said bonds at par or in the net cash proceeds of the sales thereof, at the option of the finance company, and on said stock in said stock at par, and that such payments or deliveries were to be made from time to time *pro rata* as any

391 of said bonds shall be negotiated, sold, or exchanged for outstanding liabilities or for property, labor, and material required by said railroad companies or either of them, otherwise used or disposed of. Prior to the consummation of any agreement with Mason and Jillson I wrote to Brown from Providence, addressing him at Whately or — other point in the vicinity of Northampton, Massachusetts, where he was then temporarily sojourning, that the American Finance Company could not afford and would not undertake to raise this $325,000 in money for him, by means of which he should make a large profit, unless the finance company was allowed to treat the transaction as a sale of the whole 800 bonds,

for the reason that if it should happen that he, Brown, should be unable to pay the notes the lenders would in effect become the purchasers of the bonds, and that if the pending agreement should be consummated with Mason and Jillson our $80,000 of bonds must be then and there delivered to us. I wrote this letter from the Narragansett hotel, Providence, R. I., and, as it was very late at night, I was too tired to write a copy of the letter and I have no copy. What I have stated about it is the purport and substance of the letter. Brown wrote me in reply accepting in every respect those terms, which he also confirmed in person when he came to Providence, and paragraph No. 9, in Exhibit No. 2, was the consummation and confirmation of that agreement.

Judge BURKE: I call that to the attention of the court to show that, after all the long story about it, it is all embraced in paragraph No. 9 of the tripartite contract. That is the reason why I make use of that.

392 Judge BURKE: Now, after considerable debate, the question was repeated on page 241 (as follows):

Q. I now repeat my question and call your attention to the fact that it calls for an answer which shall give a date only.

A. I am unable to make any other or better answer than I have already made.

Q. Do you now decline to state the date when the American Finance Company became entitled to a commission for negotiating the $800,000 of bonds inquired about?

A. As the question involves the interpretation of the contracts, I will have to leave that to the court, after having answered it the best I could.

Q. Was the negotiation of the tripartite agreement itself, Exhibit 2, the thing which entitled the American Finance Company to the commission of $80,000 in bonds now inquired about?

Question objected to because the tripartite contract was signed by the American Finance Company and imposed obligations upon it, as appears by the terms.

A. As that is the same question in another form, I must make the same answer.

Q. Do you decline to answer that question otherwise than as you have now assumed to answer it?

A. Having answered the question fully so far as I am able, I decline to have any answer made for me. I have answered the question fully. I do not decline.

Q. Did the American Finance Company become entitled to that commission of $80,000 in bonds on the 24th day of September, 1884?

A. As that is the same question again in still another form, I cannot add anything to my former answers.

Q. Do you now produce the alleged letter from the defendant Brown, last mentioned by you as having been received from him in reply to a communication from you which you said was written to him in Providence and prior to September 24, 1884?

393 A. I do not, because I have been unable to find it after diligent search. The correspondence took place while I was traveling in New England without the customary facilities for taking care of my papers.

Judge BURKE: I call the court's attention to that and put it in evidence.

Judge BURKE: On page 245 I draw attention to the following:

Q. It has been heretofore testified in this proceeding that the American Finance Company holds 49 bonds of the defendant railway company, claiming to hold them as commissions earned under the two agreements marked respectively Exhibits 1 and 2; is that a fact?

A. I presume it is.

Q. What is it that was done by the American Finance Company which it claims to have entitled it to those bonds or any of them as or for such commission?

A. It accomplished Brown's purposes in the raising of the $325,000 loan and getting the road out of the hands of a receiver, as contemplated in the agreement of April 14, 1885, and as provided in article 9 thereof, and as consummated by the loan under the tripartite agreement.

394 Judge BURKE: Now, I call particular attention to the ac't filed by the American Finance Co. against Brown, on p. 316, viz:

T. P. Brown in ac. with the American Finance Company under the provisions of an agreement of September 24, 1884, between said T. P. Brown, said American Finance Company, and Israel B. Mason and Francello G. Jillson.

1884.

Oct. 24. To commissions, Am. Finance Co., for the negotiation of notes with Mason & Jillson $8,125

Judge BURKE: That is the first charge made in their bill, and they say it is made under the contract. I claim that if they were to have the 30 bonds for that work they certainly were not to have the $8,125 also, and that shows what they were to have.

Now, I will read Mr. Brown's deposition in this case. We refer to his evidence here in the case.

Mr. FOWLER: What is that book that you are now reading from?

Judge BURKE: It is simply a copy of the evidence we have on file here in this case.

Mr. FOWLER: Is not that book the printed record, which was printed by you and submitted to Judge Wallace in the city of New York?

Judge BURKE: Yes; it is the one we used in New York.

Mr. FOWLER: It was printed by you?

Judge BURKE: Not by me.

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Judge BURKE: It is simply a copy of the evidence we have on file here in this case.

Mr. FOWLER: Is not that book the printed record, which was printed by you and submitted to Judge Wallace in the city of New York?

Judge BURKE: Yes; it is the one we used in New York.

Mr. FOWLER: It was printed by you?

Judge BURKE: Not by me.

Mr. FOWLER: I mean it was printed at your expense; yours and Mr. Charles Hickox's.

Judge BURKE: I don't know, sir. I presume it was; but that I do not know, sir.

I find Mr. Brown's evidence in here is in the shape of an affidavit, and I shall be compelled to produce him as a witness.

395 Mr. FOWLER: Then you do not close or do you close affirmatively?

Judge BURKE: Will you allow me to use his evidence in that shape?

Mr. FOWLER: Certainly. I will allow you to use anything that is in that printed book.

Judge BURKE: Then I will do that. It is understood I use it the same as if he were on the stand.

Mr. FOWLER: It is also understood that I can use the printed matter that was submitted to Judge Wallace?

Judge BURKE: I think so. I see no objection to that. I do not see any use going over it again. I mean subject to its competency, of course.

Mr. FOWLER: This affidavit of Brown would not be competent at all, but I admit it.

Judge BURKE: I mean so far as the subject-matter is competent. Of course, the affidavit is not competent in one sense.

Mr. FOWLER: So far as it is relevant?

Judge BURKE: So far as it is relevant. Brown's affidavit begins on page 520 and extends over a number of pages. In that I call particular attention to the fact that Mr. Brown denies having written any letter to Mr. Short, as Short claims. I put that affidavit in evidence and I do not think I care to put in anything else in chief.

The petitioners rest subject to the production of the assignment between Judge Burke and Theophilus P. Brown, dated the 1st day of April, 1886, or thereabouts, if such contract is not destroyed or lost.

Mr. FOWLER: I now move, sir, to dismiss all proceedings of these petitioners in the master's office on the ground that there
396 is no evidence offered in support of the allegations of the petition by the petitioners. There is nothing to show that they ever became entitled to the 80 bonds referred to in their petition or acquired any interest therein, but, on the contrary, there is evidence that before the petitioners pretended to have acquired any interest or made any contract in reference to said 80 bonds that T. P. Brown had divested himself of all interest or equity in such 80 bonds by means of a contract made with the Columbus, Toledo & Hocking Valley Railroad Company, and that if anybody besides the American Finance Company is in reality concerned with such bonds it is the Toledo, Columbus & Hocking Valley Railroad Company, so far as the evidence now before the master is concerned, of the sale to R. N. Hazard, the transferee of that contract.

And upon the additional ground that there is no power or authority in the master to determine a proceeding of this character where

the bonds are not produced in evidence and where there is no adverse claim made in these proceedings at the present time by the American Finance Company to such bonds; for ought that appears the American Finance Company has parted with all its interest in such 80 bonds before these proceedings were opened before the master.

And on the further ground that any contest as to the title to these 80 bonds ought to be made by an independent suit or litigation and cannot be made by a proceeding instituted in a master's office for the first time after decree of foreclosure entered in the case. We contend that you have no jurisdiction whatever to pass upon this imaginary contention, which is only presented by an adverse or alleged adverse claimant without the production of the bonds in the master's office and without any real adversary party to such contention.

And on the additional ground that by this proceeding of the petitioners the American Finance Company are made to be deprived of a lawful trial by jury, to which they are entitled in refer-
397 ence to any dispute or contention as to the ownership of the 80 bonds.

And also on the further ground that the petitioners, Mess. Burke and Hickox, have a full and complete remedy in respect of the ownership of such 80 bonds by a proceeding at common law in the ordinary course.

To cover it more fully I might state that by the practice of the circuit court of the United States, in equity, there is no authority or power to conduct a proceeding of this character set up in the second petition of Mess. Burke and Hickox in the master's office and because all such proceedings are contrary to established practice in chancery cases.

The MASTER: Do I understand the gentleman to except to the non-production of the 713 bonds?

Mr. FOWLER: No. Judge Burke says they have them, and I suppose for so large a sum of money they were in the hands of the pledgee, but his statement is sufficient.

The MASTER: Then for the purposes of this motion the 713 bonds may be considered as produced.

Mr. FOWLER: You may make a statement on the record that they are produced, entering them on the record Nos. so and so.

Mr. CROW: If the court please, I desire to say and reiterate all that I stated here this morning, saving to myself any right on behalf of myself and all other parties I may think proper that I join in the motion made by Mr. Fowler, at least on behalf of all the interests I represent except Mr. Hazard, and I will reserve this question until later on.

And I also desire to raise this point at this time, not as a contestant, because I do not appear here in the capacity of a contestant, but in protesting, as I have already stated. I submit in addition to all Mr. Fowler has stated that the record shows conclusively
398 that Mr. Burke and Mr. Hickox have no title to any bonds of the Toledo, Columbus & Southern Railway Company. I

do not state that as a contestant, but I state it as a fact based on the record as appears before the master.

Said motion was overruled; to which ruling the defendants at the time excepted.

The MASTER: The motion is overruled on the ground that I feel concluded by the decree of the court, and assume that the court held it had jurisdiction when it sent the matter to the master on a reference.

Adjourned until Tuesday, March 12th, to New York city.

399 Circuit Court of the United States for the Northern District of Ohio, Western Division.

AMERICAN LOAN & TRUST COMPANY
against
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

Proceedings before A. J. Ricks, special master, at the office of Robert Ludlow Fowler, 41 Wall street, in the city of New York, on Tuesday, March 12th, 1889.

Met pursuant to adjournment.

Appearances: Mr. Robert Ludlow Fowler (under protest), counsel for the American Finance Company; Mr. Burton Harrison, for the Toledo, Columbus & Southern Railroad Company. Mr. Moses R. Crow appears, subject to all the objections taken at the last hearing, as shown by the record, and also objects to the statement in the beginning of the last record that the same was had upon due notice to all parties, saving the point involved in that objection for hearing before Judge Jackson.

Mr. CROW: I desire to read and have spread on the record the following order, understanding that the papers filed on the 15th of February last at Toledo are before the master and having been put in by Judge Burke. (Said order marked Ex. A.) I desire to state that this proceeding is not being prosecuted at this time on behalf of myself or any of the parties I represent; that it is being prosecuted, as I understand, by Judge Burke, and that any report that may be made in the matter that either decided against the rights of Judge Burke or against the rights of the parties I represent would be an infringement of this injunction order, and I claim that this proceeding on behalf of Judge Burke is also an infringe-
400 ment of this order. I only come here on this proceeding because I had notice indirectly. Mr. Short informed me of the notice of the hearing, but I have never yet seen the intervening petition they claim this hearing is under. I have seen the decree of June 23rd, but I have never seen the petition nor the answer to it.

Mr. Fowler, for the respondent, The American Finance Company, offers in evidence the record part of which was heretofore used on

this proceeding by Judge Burke and entitled Theophilus P. Brown, complainant, against The American Finance Company, Israel B. Mason, Francello G. Jillson, John Doe, Richard Roe, The American Loan & Trust Company of New York, and The Toledo, Columbus & Southern Railway Company of New York and The Toledo, Columbus & Southern Railway Company, defendants, in the case in the circuit court of the United States for the southern district of New York.

The master decides that the order of March 1st, 1889, was not intended to suspend the order of reference made and under which he is now proceeding and directs the parties to go on and offer their testimony.

With regard to the offer of Mr. Fowler, Mr. Harrison states that he is not instructed with regard to what has heretofore been done before the master or as to any use made of that record by Stevenson Burke, and he therefore objects that the matter offered is irrelevant and immaterial and is incompetent to be proved by that record in this proceeding. I do not object to it upon the ground that it is not an authenticated or certified copy or that it is not the original.

Mr. FOWLER: The printed record is offered by the counsel for the respondent, The American Finance Company, in lieu of a certified copy and with the same effect. I offer the entire record in evidence and we will have it marked.

401 (The record is marked "Respondent American Finance Company's Exhibit B, filed March 12, 1889, New York;" the order marked Exhibit B 2.)

Mr. FOWLER: I now offer, in addition, copies of the order of dismissal of that suit, the record of which orders of dismissal has been just introduced in evidence.

The orders of dismissal are marked "Respondent American Finance Company's Exhibit C, filed March 12, 1889," and Ex. D, respectively.

Stipulated there is no objection to the introduction of the orders because they are copies and they are introduced to the same effect as if they were certified or authenticated copies, but Mr. Harrison's objection applies to the offers of those two papers with the same limitations as above expressed.

The record in the said suit, Exhibit B, includes the opinion of Judge Wallace, which is reported in the first volume of the Railway Incorporation Law Journal, at page 513, and in volume 31 of the Federal Reporter, at page 516.

Mr. Fowler introduces no new evidence upon the question of the title to the bonds held by the American Finance Company at the date of Judge Wallace's opinion upon the part of the American Finance Co.

Mr. FOWLER: I call Mr. Morris K. Decker on behalf of the American Loan & Trust Co., a holder of bonds.

Mr. DECKER, after having been duly sworn by the master, testified as follows:

Mr. FOWLER: Are you an officer of the American Loan & Trust Company?

A. I am the assistant secretary.

Mr. FOWLER: Does the American Loan & Trust Company hold any of the bonds of the Toledo, Columbus & Southern Railway Company?

A. Yes, sir.

402 Mr. FOWLER: You produce them?

A. Yes.

Q. Will you please read the numbers of the bonds?

A. 712, 737, 741, 746, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 770, 775, 776, 777, 778, 779. Now, again, 825, 824, 823, 822, 821, 820, 819, 818, 817, 816, 815, 814, 813, 812, 811, 810, 809, 808, 807, 806, 805, 804, 803, 802, 801, 694, and 695.

Q. Mr. Decker, are you able to state when the trust company which now produces the bonds acquired them and for what consideration?

A. They were at different times; the first five numbers that I read, or rather numbers 712, 737, 738, 741, and 746, were taken as collateral on the 7th of April, 1888; consideration, $2,000.

Q. You produce the note for $2,000?

A. Yes, sir.

Mr. FOWLER: I offer the note in evidence. (Marked Exhibit E.)

Q. Has that note been paid, Mr. Decker?

A. No, sir.

Q. Now, go on, if you please, and state the consideration of your holding the other bonds.

A. We held 27 bonds, the numbers being those which I last read in the long list, beginning with 825 and ending with 695.

Mr. DECKER: Those bonds (27 in number) are collateral to two notes, one for $10,000, dated March 21, 1887, and the other for $15,000, dated March 22, 1887, both made by J. M. Ashley.

Mr. CROW: I object to the list of the 27 bonds going on the record for the reason that there is nothing here to dispute the title of Mr. Ashley or whoever else may hold those bonds. The question whether they are pledged as collateral to the American Loan & Trust Company is not relative to this case, and as regards those bonds I now exhibit them to the master as the bonds of R. N. Hazard and J. M. Ashley.

Mr. FOWLER: You now produce the notes, Mr. Decker?

A. Yes, sir.

(Notes marked respectively Exhibit- "F" and "G.")

403 It is stipulated that the original of the notes should be marked by the master and produced when required, and that meanwhile copies of the originals shall be introduced upon the rec-

ord with the same effect as if the originals were taken into the custody of the master.

Q. Mr. Decker, will you proceed to state the other bonds?

A. I hold 20 bonds numbered, as I read them before, from 750 to 779, making 20 bonds in all, as collateral to a note for $14,000, signed by the American Finance Company, J. C. Short, president, and W. A. Miner, assistant secretary. This loan was made September 13, 1887.

Q. Upon a note?

A. Yes, sir.

Q. On which the bonds are now produced as collateral?

A. Yes, sir.

Q. Was that note ever paid?

A. No, sir.

Q. Renewed?

A. No, sir; not renewed exactly; a new piece of paper was made in its place.

Q. You now produce the substituted paper?

A. Yes, sir.

Q. On which the bonds originally taken, as you stated, are still held as collateral?

A. Yes, sir.

Mr. FOWLER: The American Loan & Trust Company offers the note in evidence.

(Note marked by the master Exhibit H.)

Q. Is that note unpaid, Mr. Decker?

A. It is unpaid; yes, sir.

Q. I understand that the American Loan & Trust Company holds these bonds which you have enumerated as collateral for the paper which you have produced?

A. Yes, sir.

Q. And as such holder for value presents the bonds to the master in this ancillary proceeding?

A. Yes, sir.

Mr. FOWLER: That is all with this witness.

MASTER to Mr. Decker: There is no special endorsement on those bonds; they are all payable to bearer?

404 A. I do not know; I did not notice. I think they are, sir.

Cross-examination of witness by Mr. HARRISON:

Mr. CROW: I object to all this evidence in so far as it in any way controverts the order entered in Nashville on the 1st day of March, 1889.

Mr. HARRISON: Referring to a memorandum which you produced pinned to the note which is marked Exhibit E, in whose handwriting is that memorandum?

A. It is my handwriting.

Q. Whose signature?
A. That is J. S. Thurston's, the secretary.
Q. Do you recollect this transaction?
A. That refers to that memorandum?
Q. Yes.
A. I have no special recollection of it.
Q. You recollect that it was made at the time it purports to have been made?
A. I have no special recollection of it at all.
Q. Have you any recollection of it as to the time when that memorandum was made?
A. I could not say that I do.
Q. Do you of your own knowledge know that $2,000 was advanced by the American Loan & Trust Company upon that note which is marked Exhibit E?
A. I think I can testify I made the ticket myself.
Q. Can you testify as to the time when that advance was actually made?
A. I am governed only by the note and the ticket in the matter and such entries as I might find on the books.
Q. Have you now referred to those entries and refreshed your memory?
A. No; I have not.
Q. And except for the recitals on the face of these two papers you have no information on that subject?
A. No, sir.
Q. And you have no personal recollection as to the transaction at all?
A. I do not recollect anything now particularly about that transaction.
405 Q. Was this an actual advance of money?
A. Yes, sir.
Q. How do you know that?
A. Because it is a charge against a call loan; it is a cash item.
Q. Where? A cash item where?
A. In our business; in our cash for the day.
Q. Do you say that of knowledge of this transaction or just reasoning on general principles?
A. Well, I could not say I have a recollection because it is not possible for me to recollect that one transaction out of so many.

Mr. HARRISON: I would like to have that memorandum which is annexed to Exhibit E marked in evidence.
Mr. RICKS: Petitioners' Exhibit I, filed March 12, 1889, by request of Mr. Harrison.

Mr. HARRISON: Have you any knowledge that the bonds referred to in Exhibits E and I were, on the 7th day of April, 1888, the property of J. C. Short?
A. I have no particular knowledge myself.
Q. Have you any knowledge at all?
A. I think not.

Q. Do you know that the market value of the bonds on that date was 80?

A. I do not.

Q. How came you, in comparing Exhibit I, to make down such a recital in regard to it?

A. It is usual to put down an estimated value when a loan is made and whoever does that does it with the best information that they have at the time. I could not recollect now what information I had at the time in regard to it.

Q. Can you say of your own knowledge that Exhibit E is the identical paper upon which that advance of $2,000 was made?

A. Yes.

Q. How do you know that?

A. Because I was the clerk who acted in that capacity of what we call making the loan.

Q. Has that paper remained in your custody as clerk from that time to this?

A. Not at all times in my own custody.

406 Q. Is there anything about that paper that enables you to say you actually remember that paper?

A I could not say that I could remember that paper.

Q. Now, with Exhibit H you produce a memorandum in writing, which is pinned to it. I ask you to look at that memorandum and inform me whose handwriting that is.

A. That is in the handwriting of J. C. Cruikshank, who was formerly the assistant secretary.

Q. Have you personally any recollection as to when the transaction represented by that memorandum was had?

A. No, sir.

Q. Have you personally any knowledge when the note of the American Finance Company, which is marked Exhibit H, was actually made?

A. The one you hold in your hand?

Q. Yes.

A. No; I have not.

Q. Have you personally any knowledge that that Exhibit H is a substitute for a paper which was taken originally at the time a memorandum now pinned to Exhibit H was made?

A. No; I have not. I brought a clerk with me, who made the substitution.

Mr. HARRISON: I ask to have that memorandum marked in evidence.

(Memorandum marked "For Petitioners' Exhibit J, March 12th.")

Q. Have you any knowledge as to who was the owner of the bonds mentioned in that memorandum at the date of it?

A. The last one you were speaking of? No, sir.

Q. Have you any knowledge as to who were the owners of the bonds mentioned in Exhibit H at the date of that exhibit?

A. No; I have no knowledge.

Q. Have you any knowledge that there was an actual advance of $14,000 in money on the bonds mentioned in either of those exhibits, H or J?

A. Yes, sir; I have knowledge of that.

Q. How did you get it?

A. I looked on the American Finance Company's account on our books before I came here.

Q. And that is your only knowledge, that you looked on the account of the American Finance Company in the books of
407 the American Loan & Trust Company, and you have no other knowledge whatever?

A. No, sir; all taken from the records

Mr. CROW to witness: Do you know whether the bonds were listed?

A. I do not know; there is nothing to show whether they are listed; nothing that I have to show.

Q. Do you know Mr. Stevenson Burke?

A. No, sir.

Q. Were you with the trust company in 1886-'87?

A. Yes, sir.

Q. Was Stevenson Burke a director of the company then?

A. I think he was. He has been a director of ours, and, I think, at that time.

Q. Well, now, the money as advanced by the trust company was shown by these various notes?

A. Yes, sir.

Mr. FOWLER: I wish you would look at those notes, and, so far as you are able to state, state whether they are the signatures of the persons who purport to sign them and whether they are in their handwriting?

A. Yes; I believe these to be, so far as Mr. Short is concerned and Mr. Ashley; I am acquainted with their signatures. I do not know that I have seen Mr. W. A. Miner's signature before; I do not recollect having ever seen his signature before; but those of Mr. Short and Mr. Ashley I have seen, not frequently, but enough to recognize them.

Mr. CROW to witness: The only title that the trust company claims to these bonds is the usual collateral title?

A. That is all, I believe.

(Mr. H.:)

Q. Now can you testify in regard to any one of the loans which you have mentioned that it was made to the person who made the note to which it is attributed?

A. Yes; I so testify in regard to the $14,000, one of the American Finance Company, which was credited to their account.
408 Mr. HARRISON: Was there an actual loan of money to the finance company?

A. Yes, sir.

Q. The American Finance Company received it?

A. Yes, sir; it was placed to their credit.

Q. Was it drawn upon by the American Finance Company?
A. Yes, sir.
Q. Used by them?
A. Yes, sir.
Q. Now, were the bonds held as collateral to the loan in the custody of the trust company at the date of the original transaction made in the memorandum, Exhibit J, September 13, 1887?
A. Yes.
Q. Those identical bonds have been in the custody of the trust company from that time?
A. Yes; I believe that to be so, sir, because most of the time I have known about the bonds, and I would have known of any substitution and did not hear of any.
Q. When Exhibit H was taken, the note of the American Finance Company, what became of the note that had first been held for which those bonds were taken as collateral?
A. That I could not tell you.
Q. Who made that note?
A. I cannot tell you.
Q. Who originally deposited those bonds in the hands of the American Loan & Trust Company?
A. The records are that the loan was made to the American Finance Company originally Sept. 13, 1887.
Q. You have no other information on the subject?
A. None. I go entirely by the records.
Q. Now, with regard to Exhibit E. To whom was that $2,000 therein referred to actually advanced—who received it?
A. I cannot testify about that. I am not informed.
Q. You have no information as to who received the $2 000 for which the note Exhibit E was given?
A. No; I have no information.
Q. And I am correct, am I, in understanding you to testify that you do not know the actual date of that transaction of the
409 $2,000?
A. Yes, sir; I testified at the date of the transaction.
Q. Well, except as it is shown by the papers the date is unknown to you?
A. Except as is shown by the papers it is unknown to me.
Q. Do you know how that $2,000 was paid, recited in Exhibit E?
A. No, sir; I have not looked that up.

Mr. HARRISON: That is all.
Mr. FOWLER: I call Mr. Ritch.

HENRY REMSON RITCH, being duly sworn by the master, testified as follows:

Mr. FOWLER: Will you state your residence and occupation at the present time?
A. 369 West 46th street; loan clerk in the American Loan & Trust Company.

Q. State, if you please, whether you have any knowledge about this note, Exhibit H, which I now show you.

A. Yes, sir; that loan was originally made September 13, 1887, and the note given for it was a note of similar form that we had at that time. This is a new form adopted about six months ago, but the note at that time was not attested by the company and did not have the company's seal on. When I became connected with the company I called Mr. Baldwin's attention to these points and the new form was adopted, and I was instructed to make the new note on the new form and get Mr. Short to sign it and have it attested by the seal of the company also; but the loan was never renewed; a new note on the new form was made in its place. The date was adopted because we sent out bills for quarterly interest and the interest was due September 30, and they paid it the next day, the first of October, and we did it on that account; that was all.

410 Q. That note was held by the trust company with the bonds as collateral?

A. Yes, sir.

Q. And never has been paid?

A. Yes, sir.

Q. Are you familiar with the signature of the officers of the American Finance Company and their handwriting?

A. I am with Mr. Short's, the president of the company; I am not familiar with Mr. Miner's.

Q. Is that Mr. Short's signature?

A. Yes, sir.

Mr. FOWLER: That is all.

Mr. HARRISON: Do you know who was the owner of the bonds at the time of the original transaction?

A. No, sir.

Q. Do you know that there was an actual advance of $14,000 in cash?

A. No, sir; I do not know actually it was so, but I know from those tickets.

Mr. HARRISON: We know what it was on the tickets.

Q. Do you know, if there was an advance, to whom it was actually made; who actually received the money?

A. No, sir.

Q. You only know from those two papers, Exhibit H and J?

A. I know nothing more about it except what the papers on their face show; that is all. I was not with the company at that time.

Q. When did you go into the employment of the company?

A. I think about the middle of May last, 1888.

Q. What additional value did you place upon having that note attested by the seal of the company?

A. The only reason I had was that on looking through the loans I noticed that the other note had been executed by the finance company, signed by Mr. Short and attested by the treasurer's signature, and also the company's seal on it, and when Mr. Baldwin came

there I called his attention to these things and he stated to have the new note made that way; only as a matter of form; to have it as near perfect as possible; that was the idea.

Mr. HARRISON: That is all.

411 Mr. FOWLER: I will produce at the hearing to-morrow for the Chase National bank five bonds held by that bank, which are entitled to share in the distribution they claim.

Mr. Crow gives notice that it will be claimed upon the hearing that the bonds that have been presented here to-day are the bonds of the different petitioners who signed the petition on February 15th.

Mr. Fowler asks whether it is claimed that the American Loan & Trust Company are not entitled to hold these bonds as collateral for the notes which have been produced.

Mr. CROW: They are entitled to hold them.

It is not claimed by Mr. Crow that the American Loan & Trust Company have not the right as against the owners of the bonds represented by him to hold such bonds as collateral security for the notes which have been offered in evidence.

Mr. CROW: I inform the American Loan & Trust Company and all the parties to this litigation that under and by virtue of the certain contracts made by me I have rights in equity before any sale of the bonds could be legally made.

Mr. FOWLER: I claim the American Loan & Trust Company are not here for the purpose of receiving notices.

Hearing adjourned until to-morrow at 11 a. m., at same place.

412 Circuit Court of the United States for the Northern District of Ohio, Western Division.

AMERICAN LOAN & TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY.

Proceedings before A. J. Ricks, special master, at the office of Robert Ludlow Fowler, 41 Wall street, in the city of New York, on Wednesday, March 13, 1889.

Met pursuant to adjournment.

Appearances: Same as at meeting of March 12th, 1889.

Mr. Fowler offers in behalf of the respondent, The American Finance Company, a paper which was marked "Exhibit B 2, March 12th."

Mr. Fowler called on behalf of the American Loan & Trust Company, in support of the bonds held by them, Mr. WILLIAM A. MINER.

By Mr. FOWLER:

Q. Mr. Miner, what is your occupation at the present time?

A. I am an officer of the American Finance Company.

Q. What officer?

A. Vice-president and treasurer.

Q. Do you produce the deposit book of the American Finance Company with the American Loan & Trust Company?

A. I have it.

Q. Will you produce it?

A. Yes, sir. (Deposit book produced.)

Q. Just read the deposit under the date of September 14, 1887.

A. There is no deposit under date of September 14th, 1887; on the 13th of September there were three deposits, one for $14,000, which is the one I suppose you refer to.

Q. Just read the entry.

A. September 13th, $14,000, and the clerk's initials, H. L.

Mr. FOWLER: I ask to have that entry read in evidence;
413 just that particular item; the following entry, to wit: "September 13th, H. L., $14,000," in the bank deposit book, being the bank book kept by the American Loan & Trust Company in account with the American Finance Company.

Q. Are you familiar with the fact that that $14,000 was drawn upon by the American Finance Company?

A. The books show it was.

Q. And has never been repaid by the American Finance Company to the American Loan & Trust Company?

A. No, sir.

Q. I call your attention to the note, Exhibit H; we will assume that this is the original and ask you whether that note is still due from the American Finance Co. to the American Loan & Trust Company, due and unpaid.

A. The note is still due.

Q. And does the American Loan & Trust Company hold collateral for that note?

A. They do.

Q. What collateral?

A. They hold 20 of the Toledo, Columbus & Southern railway bonds.

Mr. FOWLER: That is all on behalf of the American Loan & Trust Company.

Cross-examination by Mr. HARRISON:

Q. How long have you been vice-president and treasurer of the American Finance Company?

A. I have been treasurer since May, 1888; vice-president since December, 1888.

Q. Had you any relations with that corporation before that time?

A. I became associated with the finance company in March, 1888.

Q. In what relation were you then?

A. I held no official position.

Q. Clerk?

A. I suppose so.

414 Q. Who is the president of the American Finance Company?

A. John C. Short.

Q. Is he here present in the room as you testify?

A. He is.

Q. How long has he been president of that corporation?

A. Since its organization.

Q. That was some years ago?

A. Several years ago.

Q. Prior to 1880, was it not?

A. I think so; about that time, I should think.

Q. Have you any personal knowledge of the transaction represented by that entry in the bank book which has been read in evidence?

A. Nothing more than the books show.

Q. Have you any personal knowledge that that deposit or alleged deposit of $14,000 has been actually drawn out by the American Finance Company?

A. Only as the books show.

Mr. HARRISON: That is all.

JOHN C. SHORT called by Mr. Fowler and sworn on behalf of the American Loan & Trust Company:

Q. Mr. Short, where do you reside?

A. In the city of New York.

Q. Were you in 1887 president of the American Finance Company?

A. Yes, sir.

Q. Now, please look at this book I show you and state what that book is.

A. The book handed me is the pass book containing the account between the American Finance Company and the American Loan & Trust Company.

Q. Will you kindly read the item which has been marked in evidence just heretofore, September 13, 1887, and state whether you have any personal knowledge of that transaction?

A. I have examined the item. I made the transaction myself.

415 Q. What was the transaction?

A. The transaction was the making of a note by the American Finance Company to the American Loan & Trust Company for $14,000 and the deposit of $20,000 of Toledo, Columbus & Southern Railway Company as collateral.

Q. And did the American Loan & Trust Company give you credit in your deposit book for the $14,000 loaned to you at that date?

A. It did.

Q. Look at the note, Exhibit H, which I now show you. Assume that that is the original and state whether that note was given for the amount of that loan.

A. It was.

Q. That is the note of the American Finance Company?

A. It is.

Q. Is that note unpaid?

A. It is.

Q. And what collateral security has the American Loan & Trust Company for the payment of that note?

A. It has $20,000 of the Toledo, Columbus & Southern Railway Company bonds.

Q. Those are the same bonds that were produced here yesterday, were they?

A. They were the same.

Q. And, as between your company, the American Finance Company, and the American Loan & Trust Company the American Loan & Trust Company would be entitled, would it, to receive the proceeds?

Mr. HARRISON: I object. That is incompetent, asking the opinion of the witness on a point of law.

(Question withdrawn.)

Q. Does the American Finance Company make any claim here for the proceeds of sale of the Toledo, Columbus & Southern road upon the 20 bonds produced here yesterday by the American Loan & Trust Co.?

Mr. HARRISON: I object; that the witness is sworn on behalf of the American Loan & Trust Company. He is not sworn on behalf of the American Finance Company. Unless the witness be sworn and examined as witness for the American Finance Com-
416 pany I object to his testimony as to what that corporation claims.

Mr. FOWLER: Please answer the question.

(Question re-read and witness answers:)

A. It does not.

Mr. FOWLER: That is all.

Mr. HARRISON: That is all.

Mr. CROW: Mr. Short, do you mean to say that if the proceeds of the sale——

Mr. FOWLER: I object to Mr. Crow's asking the witness any questions at the present time; Mr. Crow is not a party to the controversy between Judge Burke and the American Finance Company, and I think if he wishes to call any witnesses here before the master I have no objection. But in the shape of cross-examination of this witness it would only embarrass my record. I would not be able to argue the case with that freedom and precision, as if the record was my record.

Mr. CROW: Well, the only reason I asked the question is for my own record.

Mr. FOWLER: Your record has not come.

Mr. CROW: Mr. Short is testifying to something now which, if it is true, is against the agreement which he has made with Mr. Hazzard and myself in this matter.

Mr. FOWLER: I object to your entering into a controversy with Mr. Short at this time.

Mr. HARRISON: Mr. Crow's question seems to have as much relevancy as your own.

Mr. FOWLER: I am perfectly willing to submit it to the master, but it is a little anomalous, it seems to me.

Mr. HARRISON: He is entitled to have the witness explain or correct his answers.

The MASTER: It is more a matter of comity, I think, be-
417 tween Mr. Fowler and Mr. Crow. His appearance has been entered as counsel and I do not know as I could prevent him from answering.

Mr. FOWLER: I understand the correct practice to be that where there is a contention the contending party has the right to cross-examine. Now, there is no contention between Mr. Crow and myself in this matter, and on account of my record being embarrassed it strikes me as irregular.

Mr. CROW: I will now state on the record that I do feel there is or will be a contention between yourself and me. Mr. Short has sworn that they are the owners and holders of certain bonds. If this answer of his be true, they do not even make a claim to the bonds. Therefore Judge Burke can come into court and use your questions and answers on a motion to set aside the sale.

Mr. FOWLER: You ask such question- as you like. I will not be responsible for them, however.

Mr. CROW: Can you explain the answer, Mr. Short, that you have made with reference to this, if there be an equity in the bonds above the collateral security which the American Loan & Trust Company holds? Do not you or the finance company claim that?

A. The finance company owns the bonds and has pledged them for this loan, and, as I understand it, the trust company would be entitled to the proceeds of the sale of the road up to the amount of their loan. The bonds are owned by the American Finance Company, but are not in its possession, but the balance above the amount of the trust company's loan would come to the American Finance Company.

Mr. FOWLER: If the present sale were to stand there would be no balance, would there; in other words, the $14,000 secured by the 20 bonds would be greater than the dividends coming from the proceeds of the sale to the 20 bonds—the proportion?

A. I am unable to say how that would be.

418 Q. I mean if the sale should stand?

A. Of course I cannot tell what would be deducted from the face of the sale in the settlement and therefore could not determine what the percentage on the bonds would be. If there were

a surplus it would belong to the pledgor; if there were a deficiency the pledgor would be liable.

Mr. FOWLER: That is all with this witness.

Mr. FOWLER: Mr. AUGUSTUS WETMORE, JR., called and sworn as a witness on behalf of H. W. Cannon, president of the Chase National bank, who presents five bonds before the master.

Q. You reside in the city of New York?
A. I do.
Q. Do you now produce five of the Toledo, Columbus & Southern first-mortgage bonds?
A. I do.
Q. What are the numbers?
A. 747, 749, 764, 765, and 766.
Q. Those bonds are the property of whom?
A. Henry W. Cannon.
Q. What is his occupation?
A. Mr. Cannon is president of the Chase National bank, corner of Nassau and Pine streets.
Q. Are the coupons attached to the bonds?

The MASTER: Apparently a coupon of January and July, 1886, have been torn off and then pinned on. The other bonds all have the July, 1887, coupons as the last, I think.

WITNESS: The last coupon on this one is July, 1886.
Mr. FOWLER: What one is that?
A. Number 749.

The MASTER (after examining the bonds): They are all the same. They have been cut off, but are still here; they have been attached. They seem to be all right, Mr. Harrison.

Mr. FOWLER, continuing: Mr. Wetmore, what personal knowledge have you that Mr. Cannon is the owner of these bonds?
A. He gave me the money to pay for the bonds.
Q. When?
A. The exact date I am not able to give; it was in the latter part of 1887. We moved from our old bank in July, 1887,
419 and it was some time within the six months following that date.
Q. Who were they bought from?
A. I do not know. I presented the money and got the bonds; that is all I know.
Q. Where did you present the money?
A. I should have to refresh my memory as to that, because it is so long ago.
Q. Who did you get the bonds from?
A. That I should have to refresh my memory on, because it is a long time ago. I only remember the circumstance of taking the money in and getting the bonds.
Q. How much money did you take in?

A. I can't tell the exact amount without referring to some memorandum. I have not it with me.

Q. Did Mr. Cannon furnish you with the money himself?

A. He did.

Q. Was it in the shape of a check or in bills?

A. Check, I think.

Q. You do not remember to whose order the check was drawn?

A. No, sir.

Q. Whose check was it?

A. His own individual check.

Q. Can you now swear that those were the identical bonds you received on that occasion?

A. To the best of my belief, they are.

Q. Have they been in your custody ever since?

A. They have been in the possession of the department I am connected with.

Q. You do not remember the numbers of the bonds handed to you on that occasion?

A. No, sir.

Q. Were they purchased as an investment, Mr. Wetmore?

A. I presume so; so far as I know.

Q. It was not a loan?

A. No, sir.

The MASTER: Were they bought of some broker in the market?

A. Upon my word, I cannot state definitely. It was in some office upon Broadway that I was sent with the check and got the bonds.

420 Q. Well, was it a broker's office?

A. I do not think it was a broker's office.

Q. Did you get them from the American Finance Company?

A. It may possibly have been there. I cannot say positively.

Mr. HARRISON: Of course it may have been Trinity church.

WITNESS: I am not sure. I can't say positively.

Mr. HARRISON: Then say you don't know.

Mr. HARRISON: I do not object to the witness refreshing his recollection. Have you any memoranda here?

A. I have no memoranda here.

Q. Or at the bank?

A. I should have to refer back to get on the track again. I cannot recall it.

Q. Mr. Wetmore, one more question, please: Do you know through whom the person from whom you got the bonds claimed title?

A. No, sir.

Q. You do not know who was any prior holder?

A. No, sir; I do not know anything of that except I was to give the check to get the bonds.

Q. Do you know whether that check was paid?

A. I presume it was. I have no reason to suppose it was not paid. The bonds would not have remained in our possession if it was not paid.

Q. You do not know?

A. I cannot swear to it at present.

Q. The master suggests that you go to the bank and refresh your recollection and come back here as soon as possible if it is probable there is any memorandum there that you can refresh your recollection with.

WITNESS: I will use my best efforts. I do not know how I can do it, though, without making several inquiries, &c. All I know is as I tell you; that the check was given to me and I went and got the bonds. I cannot tell anything about the date or the circumstances.

421 MR. FOWLER: I call Mr. Miner again in behalf of the American Finance Company. You do not want to swear him again, do you, master?

MASTER: No.

Examined by Mr. FOWLER:

Q. Are you able to give the numbers of the 80 bonds which were at one time the property of the American Finance Company; the 80 bonds of the Toledo, Columbus & Southern railway?

A. Only part of them.

Q. Only part of them?

A. Yes, sir.

Q. You are not able to give the numbers of the whole of them?

A. I might find them on the books, but I have no knowledge of them at the moment.

Q. Do you know what has become of those 80 bonds of the Toledo, Columbus & Southern railway?

A. I know where part of them are.

Q. What part of them do you know?

A. 34, I believe altogether.

Q. Will you state what has become of the 34, and give the numbers?

A. J. A. Jillson——

Mr. HARRISON: I object to any testimony by this witness as to any matter which antedates March, 1888, or as to any matter as to which he relies not upon his own knowledge, but upon memoranda made in books by other people prior to that date.

Mr. FOWLER: Go on, please, and answer the question.

A. J. A. Jillson, ten bonds.

Q. Who is J. A. Jillson?

A. Doctor J. A. Jillson, of Poughkeepsie.

Q. What are the numbers of those bonds?

A. From 699 to 708, inclusive.

Q. Do you know whether he holds them as collateral or
422 whether he paid for the bonds?

A. As collateral.

Q. Collateral to what?

A. Collateral to our note.

Q. Note of when?

A. Of the American Finance Company.
Q. For how much?

Mr. HARRISON: I object to the testimony of the witness to any matter not of his personal knowledge. I make this objection to save time of the master as well as of counsel.
Mr. FOWLER: Answer.

A. I cannot say. I think $8,000 is the amount of the note.
Q. What are the numbers?
A. 699 to 708, inclusive.
Q. Consecutively?
A. Consecutively.
Q. Well, what other bonds do you know about personally?
A. William Life, of Rye, in this State, holds two bonds, numbers 714 and 718.
Q. Did he purchase those bonds?
A. Those are held on collateral for note.
Q. Note of whom?
A. John C. Short.
Q. For how much?
A. $1,500.
Q. What other bonds?
A. Doctor F. Beach, of New York, holds two bonds, numbers 722 and 723, on a note of $1,500 of Mr. John C. Short; Mr. Wilson holds one bond, number 740, on a loan of cash without note for about $900.
Q. Whose note, if you know?
The MASTER: Without note, he said.

WITNESS: Mr. Clark, of Bridgeport, holds two bonds on note of $1,500—I think, two notes of $750 each; the bonds are numbered 713 and 716.
Mr. HARRISON: State whose notes.
A. The notes of the American Finance Company.
WITNESS (continuing): Robert Black, of Newark, holds one bond for a loan of $900 to the American Finance Company, bond number 739.
423 Mr. HARRISON: Is there a note to that?
A. I think so, but I am not positive as to that note.
Q. The note of the finance company?
A. Yes; if there is a note it is the note of the finance company.
WITNESS (continuing): George B. Barnes, of Hartford, holds one bond, number 742, on a loan of $400 on the American Finance Company's note; H. Hamlin, of New York, one bond on note of Oscar H. Short, $500, bond number 771; James B. Mott, of New York, holds two bonds, numbers 715 and 772, on a loan of $2,000 on the note of William A. Miner.
Mr. HARRISON: That is yourself?
A. That is myself; I hold the American Finance Company's note with the same collateral and negotiated the loan. Joel A. Sperry, of New Haven, holds ten bonds, numbers 719, 724, 743, 767, 768,

769, 773, 774, 780, & 781, on note of William A. Miner for $10,000; I hold the American Finance Company's note for the same amount for the same collateral; Eliza M. Church, of Middleville, Mass., holds two bonds, 720 and 721, that were sold to her by the American Finance Company.

Q. For how much?

A. $2,000.

Q. Were they sold at par?

A. About par—97½.

Q. Is that all?

A. Those are all the bonds that I have positive knowledge of; the transaction has taken place since I was associated with the company.

Q. Does the American Finance Company produce any of those bonds before the master?

A. The American Finance Company has none of them.

Mr. FOWLER: That is all.

Cross-examination by Mr. HARRISON:

Q. I observe, Mr. Miner, that during your direct examination you have held in your hand, and whilst testifying have referred to, a paper. What paper is that?

424 A. It is a memorandum that I made up in order that I might have the numbers of the bonds and the names of the parties who furnished the money on those bonds, so as to be able to give them correctly without mistake.

Q. What did you make up that memorandum from?

A. From the book of the American Finance Company.

Q. Let me see that memorandum, please. (Memorandum handed counsel.)

Q. Is this memorandum in your handwriting?

A. Yes, sir.

Q. The books of the finance company show the dates of these several transactions to which you have referred?

A. Not wholly; yes; it does, most of them; I don't know but all of them. In the matter of Mr. Wilson there have been several payments by him at different times, and I have forgotten just how that is. I made that from memory. I knew he held the bonds.

Q. What are these books?

A. The general books of the American Finance Company.

Q. Not all one book?

A. No, sir.

Q. Scattered through various books?

A. Letter books and other books.

Q. Can you fix the date of each of these transactions now?

A. I think so.

Q. What was the date of the transaction of J. A. Jiilson?

A. I thought you meant could I from the books.

Q. I mean now on the witness stand.

A. No; I cannot.

Q. Nor any of them?
A. I can fix the date perhaps of one or two.
Q. What one or two are those?
A. Mr. Mott.
Q. When was that?
A. That was November 1st, 1888; and Mr. Sperry, I think that was November 1st. I am not positive about its being October or November—one of the two—1888.
425 Q. Can you say either of these transactions was in the year 1888?
A. Yes, sir; all excepting Dr. Jillson's were.
Q. All excepting Dr. Jillson's were in the year 1888?
A. Yes, sir.
Q. When was Dr. Jillson's?
A. That was in 1887, I think; the book shows.
Q. You know nothing about that personally?
A. Not beyond what I have taken from the books.
Q. You have no personal knowledge in regard to it?
A. No, sir.
Q. All the other transactions you knew of yourself?
A. Yes, sir.
Q. Did you make the transactions in all the other cases?
A. Not all. I know of them.
Q. How do you know of them?
A. From the books and from receipts of the money.
Q. Was the money paid into your hands?
A. Not in all cases.
Q. In any cases?
A. The money from Mr. Sperry and Mr. Mott was paid into my hands personally.
Q. Any others?
A. Some of it—Mr. Wilson's.
Q. How much?
A. I cannot give the exact amount of it.
Q. Was it $100 or $500?
A. Well, several amounts, large and small. Perhaps three or four of them, amounting to three or four hundred dollars altogether.
Q. Can you in any other case say that you received the moneys used?
A. Let me see that; perhaps I can tell. In the case of Robert Black I saw the check for it.
Q. Was that check paid?
A. Yes.
Q. To your knowledge?
A. Yes, sir; it was.
Q. Who was the check drawn to?
A. The check was drawn, I think, to the order of J. C. Short, president, but I am not positive.
426 Q. Who received the money?
A. The finance company; in the case of George B.

Barnes that was given him in settlement of an account for services rendered.

Q. It was one bond?

A. One bond as collateral.

Q. Services rendered to whom?

A. To the American Finance Company.

Q. What was the amount due him for services?

A. The amount due him was $400.

Q. What was the nature of those services?

A. He was the representative of the American Finance Company and its agent at Hartford, Connecticut; took charge of the branch office there.

Q. Have you now indicated all of the persons whom you can say you have received the money from or know the money to have been received from?

A. Sylvester Clark.

Q. How much?

A. $1,500.

Q. That was cash?

A. Yes, sir; cash.

Q. In bills?

A. No; by draft.

Q. Are there any others?

A. Eliza M. Church. I sold her two bonds.

Q. You did?

A. The company did; yes.

Q. To your own knowledge?

A. Yes, sir.

Q. Saw the transaction?

A. Yes, sir.

Q. She actually paid for the transaction?

A. Yes.

Q. Have you now finished all as to whom you saw the money paid?

A. I saw the purchase of William Life's bonds, his check for two of the bonds, and I saw the note made and Mr. Short's signature for it.

Q. How much was Mr. Life's check?

A. $1,500.

Q. Was that check paid?

A. It was. Mr. Short furnished the company with the money and the same with Dr. Beach. I saw the notes made and
427 the check paid, and Mr. Short advanced the money to the company. The checks were paid, so far as I know. I know in regard to all of these except the Jillson matter.

Q. You have no personal knowledge of the Jillson matter?

A. That took place before I became associated with the company.

Q. Now, can you say the number of bonds in each case was delivered to each of those individuals?

A. Yes, sir.

Q. They each took the bonds; when?

A. Yes; they each took the bonds. They were delivered with the notes.

Q. Where was that done?

A. In some cases in the office of the American Finance Company. In other cases they were taken to them.

Q. Who took them to them?

A. I took them in the case of J. B. Mott and Mr. Sperry, and sent them by express to Mrs. Church.

Q. Was each delivery upon the date of the alleged transaction as you have stated it?

A. Yes, sir; on the date or very near it. It was all within two or three days of the dates I have given.

Q. Who had held those bonds prior to these several transactions; the 34 bonds?

A. They were personal bonds of Mr. John C. Short.

Q. How as to the others?

A. One was a personal bond of Oscar H. Short.

Q. Who is he?

A. He is a son of John C. Short and secretary of the American Finance Company.

Q. I think you mentioned that one of the loans was made to Oscar H. Short, didn't you?

A. No, sir; I said on a note. The American Finance Company made a note to him.

Q. Well?

A. And the other bonds were bonds that were taken up on previous loans, paying part of this money to other parties, and to taking up the loans and transferring them.

Q. To whom had those previous loans been made?

428 A. F. A. White loaned on the bonds and held the company's note.

Q. I do not ask by whom, but to whom. To the finance company?

A. To the finance company.

Q. And by whom—Mr. White was one you mentioned?

A. Mr. White is the only one I can think of that had the bonds outside of——

Q. Was he not recently an officer of the finance company?

A. He was, until, I believe, January, 1888.

Q. How many of the bonds do you refer to as personal bonds of Mr. John C. Short?

A. Well, I shall have to consult the books to swear as to that. If I remember correctly, the bonds given to William Life and F. Beach were his.

Q. No others?

A. I cannot say as to that now.

Q. Indicate the numbers of those bonds given to Mr. Life and F Beach.

A. 714 and 718; to Beach, 722 and 723.

Q. Then except those four bonds you last mentioned and the one bond attributed to Oscar H. Short, all the others of the 34 belonged

and do belong to the American Finance Company except the one sale that was made to Mrs. Church?

A. There was one sale—they all belong to the American Finance Company and its obligations are paid on which they are held as collateral.

Q. That is to say, taking 7 from the 34 there will be 27 bonds on the list of the property of the American Finance Company, subject to its obligations on the paper held as collateral?

A. Yes, sir.

Q. Now, from whom did Mr. Short acquire those bonds?

A. I cannot tell you.

Q. From whom did Oscar H. Short acquire his one bond?

A. I cannot tell you.

Q. Can you say of your own knowledge that the several individuals to whom you have attributed those bonds as holding
429 them are now actually holding the bonds and that they have not transferred them?

A. To the best of my knowledge and belief, so far as I know, they still hold them.

Q. You have no information, certainly no knowledge, as to who are the present holders?

A. All these parties may have disposed of them for all I know.

Q. Is it not a fact that each of those collateral holders was aware at the time the collateral was taken that there was a dispute as to the ownership of those bonds?

A. That I cannot tell you.

Q. Do you know?

A. Not that I know of.

Q. Were you not yourself aware that there was a dispute as to the ownership of those bonds?

A. There may have been some litigation in connection with those bonds; exactly what it was I was not positive about. I knew there were some bonds in litigation. I never took the trouble to ascertain the numbers of those bonds.

Q. Now, answer my question. (Question re-read.)

A. No, sir.

Q. Are you now aware?

A. Yes, sir.

Q. When did you become aware that there was a dispute as to the ownership of the bonds held or formerly held by the American Finance Company?

A. During the last two or three months.

Q. During the last two or three months?

A. Since the proceedings at Toledo; about that time.

Q. Not prior to that?

A. I was not certain that the bonds were contested.

Q. Had you no information that there was a dispute as to the ownership of all the bonds now claimed to be owned or formerly held by the American Finance Company?

A. Yes, sir.

Q. What information did you have on the subject?

430 A. I had no special information. I had heard in a general way that there were some proceedings taken place in regard to the ownership of the bonds, but the particular bonds I did not know.

Q. When did that information first come to you?

A. I can't tell you positively about that.

Q. Was it at the beginning of your relations with the American Finance Company?

A. No, sir; I think not.

Q. And had not you been told there was a dispute as to the ownership of those bonds in the early days of your connection with the finance company?

A. No, sir.

Q. Can you fix the time when you first acquired that information?

A. Some time since. I cannot give the positive date.

Q. Shortly after?

A. Some time after.

Q. How soon after you became related to the finance company did you have anything to do with these bonds or any of them?

A. I helped to negotiate some loans on them and helped to obtain money on the bonds last summer.

Q. How early?

A. Well, probably June; perhaps May or June.

Q. Did you have information at the time you were helping to obtain those loans that there was a dispute as to the ownership of the bonds?

A. I did not.

Q. Are you sure about that?

A. Yes, sir.

Q. Well, how did you come to get the information?

A. It was not given to me as information. I acquired it in a general way as other matters in the business.

Q. You made inquiries?

A. No, sir; it was acquired.

Q. Who gave it to you?

A. I cannot say as to that.

Q. Don't you know?

A. I do not know. I think it was more newspaper articles than anything else.

Q. At the time of that transaction with Mrs. Church when she paid nearly or quite par for those bonds, was she informed

431 as to the dispute?

A. Not as I know of.

Q. Who had the transaction with her?

A. It was in the company's office. I took part in it.

Q. Did she know there was a foreclosure proceeding pending?

A. No, sir.

Q. Did you know there was a foreclosure proceeding pending?

A. No, sir.

Q. Did you notice there were past-due coupons attached to the bonds?

A. I did.

Q. How did you explain that fact to the persons who were dealing with you?

A. I did not explain it.

Q. Did they make no inquiries because of that fact?

A. No, sir.

Q. Do you mean to say that people came into the office and took the bonds with past-due coupons attached to them without making any inquiry as to any explanation of that fact?

A. No; they did not take the bonds with the past-due coupons on them.

Q. Were the coupons taken off before they were delivered?

A. Yes; in some cases.

Q. In what cases?

A. In the case of Mr. Sperry and Mr. Mott.

Q. Where are the coupons that were cut off?

A. They are at the company's office.

Q. Was Mr. Sperry informed at the time of the delivery of the bonds that the coupons had been cut off and pigeon-holed in the company's office?

A. I did not tell him.

Q. Did you know that they supposed that the coupons had been paid?

A. They knew they were not paid. I told them they were not paid.

Q. Did they ask any explanation?

A. They did not.

Q. And they were not told that there was a foreclosure
432 proceeding pending?

A. No; they were not told, because I did not know that there was. I did not know whether there was at that time or not. I know there was some proceeding taking place, but what I did not know.

Q. Well, you knew there was a dispute as to the ownership of the bonds?

A. I knew there was a dispute as to the ownership of some bonds, but what particular bonds I did not know.

Q. Did you tell that to Sperry or Mott?

A. I did not say anything about it.

Q. Were these people frequenters of the office or only casual visitors there?

A. Mr. Sperry was a frequent visitor there.

Q. Having frequent transactions with the office?

A. Yes, sir.

Q. Did they know anything about the Toledo, Columbus & Southern railway?

A. I told them where the line of the road was.

Q. They did not know anything about its earnings or present

conditions or whether there was a foreclosure proceeding pending or that the title to the bonds were in dispute or anything else?

A. They took the bonds from me which I held as collateral security on the notes of the Am. Finance Co. and for which I advanced money.

Q. Do you know whether Mr. Sperry or Mr. Mott is yet aware of the dispute as to the ownership of those bonds?

A. Mr. Mott is.

Q. Well, what was the information you gave him?

A. He inquired about the bonds, and I do not know exactly what was the reply that was given him.

Q. That was after he had loaned on them?

A. Yes, sir.

Mr. FOWLER: I object to that as immaterial.

Q. When was the loan made by Mr. Mott? The first of November?

A. Since that time.

Q. What was the information you gave Mr. Sperry?

433 A. He never made any inquiry on the subject.

Q. What is Mr. Sperry's business—do you know?

A. He is one of the firm of Sperry & Barnes, pork-packers, New Haven.

Q. What is Mr. Mott's business?

A. He is cashier of the firm.

Q. With regard to Mr. Jillson, what is his business?

A. I do not know whether he is in business or not.

Q. Do you know whether he is a relative of Mr. Francello G. Jillson, of Providence?

A. I do not know that.

Q. Am I correct in understanding you to state that, so far as you know, neither one of the persons you have named as holders of these bonds from the finance company or Oscar H. Short or John C. Short was aware at the time of taking them that there was any dispute in regard to the title of the bonds?

A. Not as I know of.

Q. Neither of those persons knew of the pendency of the foreclosure proceedings?

A. Not that I know of.

Q. This is your personal note that Mr. Mott and Mr. Sperry hold, isn't it—your individual note?

A. Yes, sir; the finance company made a note to me, with the bonds as collateral, to negotiate, and I negotiated my own note instead for the same collateral.

Mr. HARRISON: I would like to have the paper referred to by the witness and which he has used in testifying marked in evidence.

(Paper marked Exhibit K by the master.)

Q. Has the coupon fallen due on those bonds held as collateral?

A. Yes; in January.

Q. Was inquiry made with regard to the payment of the coupon in each case?

A. Mr. Sperry inquired if I wanted this coupon. I told him no. I would let him know if I wanted it.

Q. No other inquiries?

A. No, sir.

434 Q. Did you then give him any information as to the dispute to the title of the bonds or the pendency of the foreclosure proceedings?

A. No, sir.

Mr. JOHN C. SHORT, called on behalf of the respondent, The American Finance Company, and having been duly sworn by the master, testified as follows:

By Mr. FOWLER:

Q. Mr. Short, are you able to give the numbers of these bonds referred to in the second intervening petition of Burke and Hickox?

A. I think I can.

Q. Will you please do so?

A. I will. These are not in consecutive order, and from the best recollection I have the 80 bonds are numbered as follows: 696, 697, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 748, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781.

Q. Does the American Finance Company hold any of the bonds that you have given the numbers of at the present time, Mr. Short?

A. It does not.

Q. In addition to the 25 bonds held by the American Loan & Trust Company and those enumerated by the preceding witness, Mr. Miner, can you state where such residue of the 80 bonds is at the present time?

A. I think I can.

Q. Can you do so now?

A. I can. William P. Watson has or did have five bonds,

435 numbered 730 to 734, both inclusive. William Life has three bonds, numbered 735, 744, and 745. Wilbur F. Day has bond No. 710. L. H. Bristol has bond 711, and G. A. Scott, bond No. 697; C. A. Hopkins, bond No. 696; Mary E. Goodwin, five bonds, numbers 725 to 729, both inclusive; Mr. Field, one bond, No. 736; the estate of Homer H. Stewart, 2 bonds, 709 and 748. So far as I can now call to mind, that completes the list.

Mr. FOWLER: The American Finance Company presents before the master none of the 80 bonds that you have enumerated?

A. It does not.

Q. And none of the said 80 bonds are in the possession of the American Finance Company at present time?

A. None of them.

Q. And the American Finance Company cannot present the bonds to the master: is that the fact?

A. That is the fact.

Q. Were you personally cognizant of any of the transactions which the witness, Mr. Miner, has sworn to, Mr. Short?

A. I was.

Q. Was the transaction with Mr. Jillson a loan on the part of the American Finance Company from Doctor Jillson?

A. It was substantially a loan made by myself and rediscounted with Dr. Jillson, who holds the obligation and the bonds at the present time.

Q. Is the obligation unpaid?

A. The obligation is unpaid.

Q. Was it so with the other bonds enumerated by Mr. Miner?

A. I believe it is.

Q. And as to the sales mentioned by him, they were sales outright, were they?

A. They were.

Q. Mr. Short, state if you know why Mason & Jillson were induced to sell to Judge Burke their interest under the contract of Sept. 24, 1884, in the Toledo, Columbus & Southern R'y Co.

Mr. HARRISON: I object to that. The testimony would be only hearsay.

Mr. FOWLER: Answer.

A. The only knowledge I have is what they told me.

436 Mr. HARRISON: I object.

Q. Had you not been interfered with by Judge Burke could your company, the American Finance Company, have carried out the agreement of April 14th and September 24th?

Mr. HARRISON: I object to that as immaterial and irrelevant.

A. I have no doubt we should have completed our financing of all the securities if we had not been interfered with by the trade between Brown and the Hocking Valley Company and Judge Burke.

Q. What would have been the result to your company of the fulfillment of this agreement of September 24th and April 14th?

Mr. HARRISON: My objection to the irrelevancy and immateriality of these questions extends to the whole of this testimony.

A. By the terms of our contract we were entitled to have a commission of ten per centum on the face or par value of both the bonds and stock of the Toledo, Columbus & Southern Railway Company.

Mr. HARRISON: To that testimony I object—that the contract must speak for itself. It is not competent for the witness to testify as to that.

Q. Well, you would have received your profit under the contract, would you?

A. Yes, sir.

Q. At the date of the contract of April 14 what was the physical condition of the Toledo & Indianapolis railroad, Mr. Short?

Mr. HARRISON: Same objection as to immateriality and irrelevancy.

A. I have no personal knowledge as to the precise physical condition of the property at that time, but it was in the hands of a receiver and had just been completed.

Q. You had been over the road, hadn't you, at that time?

A. I had not been over the road at that time.

437 Q. Is it not a fact that that road was in a very bad physical condition, Mr. Short?

A. It was so reported to me by Brown and his contractor, Dowling.

Q. What were the mortgage bonds of the Toledo & Indianapolis selling at?

(Same objection by Mr. Harrison as to relevancy and materiality.)

A. I do not think there was any sale for them at any price.

Q. Were any of them negotiated at the rate of 40 cents on the dollar?

A. I think they were hypothecated at from 25 to 40 cents on the dollar.

Q. What would have been the result to Brown's interest in the Toledo & Indianapolis railway if your company had not fulfilled its agreement of April 14th, 1884, and September 24th, 1884, so far as furnishing the money was concerned?

Mr. HARRISON: I object to it as incompetent, the witness not being gifted with prophecy.

A. At the time we raised the money for Brown he was threatened with an immediate sale of the road under legal proceedings taken by creditors holding the bonds as collateral for rails sold him, and they announced their intention to acquire the road for their debt.

Q. At that time, between April and September, 1884, was not money very difficult to obtain for schemes such as mentioned in those two contracts of April 14 and September 24, 1884?

Mr. HARRISON: Same objection as to relevancy and materiality.

A. There has been no period within seven years, so far as my knowledge goes, when it was so difficult to raise money as in 1884 by reason of the failure of Grant & Ward and the Marine bank and other institutions in New York.

438 Q. Will you kindly look at this agreement and state if you know the signatures and whether you are familiar with the handwriting of the persons whose names are affixed to that writing?

A. I am not familiar with the signature of John W. Shaw, president of the Columbus, Hocking Valley and Toledo Railroad Company, which appears to the document in my hand, but I am familiar

with the signature of R. N. Hazard, which also appears to it, which I believe to be Mr. Hazard's own signature.

Q. You have seen Mr. Shaw's writing before, haven't you?

A. I do not remember that I have.

Mr. FOWLER: Well, I do not think there is any objection to that agreement. I offer the original agreement between the Columbus & Hocking Valley Railroad Company and R. N. Hazard in evidence and ask that a copy of such original agreement be marked by the master and annexed to this deposition, to be used to the same effect as if the original.

The original agreement and copy are marked "Exhibit L, March 13, 1889."

Q. I understand, Mr. Short, that you do not intend by anything that you have given in evidence — that the American Finance Company does not claim the title to the portion of the 80 bonds hypothecated, but simply that the American Finance Company does not claim under this decree in this suit the right to receive the distributive share of the proceeds of sale as against the holders of the collateral bonds; is that the fact?

A. That is the fact.

Q. I understand what you mean to say is that you have no contention here *that* Burke and Hickox simply by reason of the fact that you do not produce any of those bonds here; is that so?

A. That is the way I would understand it.

Mr. FULLER: That is all.

439 Cross-examination by Mr. HARRISON:

Q. As to the persons mentioned by you as holders of the 80 bonds. How did those persons acquire those bonds, beginning with William P. Watson and going down the list you gave?

A. William P. Watson acquired his bonds by way of a dividend.

Q. From the American Finance Company?

A. From the American Finance Company. William Life holds three bonds, which were a part of the bonds received by him as a dividend from the finance company and which I sold to him; Wilbur F. Day and L. Bristol hold two bonds as collateral security for my obligation.

Q. The bonds are your property, are they?

A. They are my property. George A. Scott holds one bond in the same way.

Q. State how much Day and the other held the obligation for.

A. Two thousand dollars.

Q. One thousand each?

A. Yes, sir; George A. Scott, one bond for $1,000; C. A. Hopkins, one bond for one thousand dollars.

Q. Your obligations?

A. My own obligations. Mary E. Goodwin holds five bonds which I sold her at par.

Q. They were your own at the time?

A. They were my own bonds. I believe that is all.

Q. How did you acquire the ownership of the bonds you have spoken of as your own?

A. As a dividend from the American Finance Company.

Q. Is it not a fact that all of the 80 bonds are among those which came to the American Finance Company under what is called the tripartite agreement with Brown, Mason, and Jillson?

Mr. FOWLER: I object to the question on the ground that it is not cross-examination and that the affirmative case of the petitioners Burke and Hickox was closed at Cleveland.

The WITNESS: All the 80 bonds were paid to us by Brown for our commissions under our contracts.

440 Q. Were those bonds ever in the custody of Brown?

A. A part of them were.

Q. Which of them?

A. I do not know certainly that any of the 80 bonds were more than nominally in Mr. Brown's possession, but he was present when they were delivered to the American Finance Company by Mr. Jillson, who purchased the Toledo & Indianapolis road and received the bonds and stock of the Toledo, Columbus & Southern railway in consideration of conveying it to that company.

Q. Who did Jillson receive the bonds of the Toledo, Columbus & Southern Railway Co. from?

A. From the railway company.

Q. Who actually made the delivery?

A. Francis A. White, president.

Q. Where?

A. In this city.

Q. Where was the delivery by Jillson to the finance company made?

A. At the office of the finance company in New York.

Q. When?

A. I should say perhaps June or July, 1885.

Q. Now, Mr. Short, why do you say that in any sense whatever those bonds were ever in the possession of Brown?

A. Mr. Brown was present with Mr. Jillson, Mr. White, and myself when the bonds referred to in the tripartite agreement were distributed. Mr. Jillson took the 745 bonds which were to go to them as collateral and for a bonus, and delivered 80 to the American Finance Company and five to Brown.

Q. Mr. Jillson took them from Mr. White, didn't he?

A. Yes, sir.

Q. It is because, then, of Brown's presence and his receipt of five bonds on that occasion that you make any suggestion that in any sense the bonds here in question were ever in his custody or possession?

A. Whether the 80 bonds were actually delivered to Brown formally and by him to the American Finance Company I cannot now remember at this time. I think it was either that way or

441 else he was cognizant of the delivery and present at the time.

Q. Well, now, with regard to two other bonds which were at one time in the custody of the American Finance Company and which, as I understand, are called the bonus of the $10,000 note of the railway company or of Brown, what became of them? Those two bonds were a part of the 715 delivered to Mason & Jillson and were received back by the finance company and delivered some time subsequent to the other delivery of which you have here spoken.

A. I think the delivery of the two bonds was made at the same time the others were, and we had already taken the $10,000 note.

Q. What was the consideration you gave for that note?

A. $10,000 in money.

Q. To whom?

A. To Brown.

Q. Did Brown receive the $10,000 in money?

A. Yes.

Q. When and where?

A. He received it with the other proceeds of the $325,000 loan, and it appears in the account rendered by the American Finance Company which has been before the court in this case.

Q. Do you recollect that upon the inquiry prosecuted in this proceeding, the record of which in print has been offered here in evidence by Mr. Fowler, that there is another version given of that transaction?

A. I apprehend there is no other version given that would change the fact; the circumstances may be explained or given in detail.

Q. Am I correct in having understood you in this testimony to say that these loans mentioned by Mr. Miner were substantially loans by you to the American Finance Company of the paper of the finance company which was given to you and which was rediscounted by the present collateral holder?

A. I think that was the case in some cases and not the case in others.

442 Q. Can you specify those in which it was not the case?

A. I am unable to say from any memorandum I have now just how that is.

Q. But it is a fact that the transaction was substantially between you and the finance company in some of those cases?

A. I do not think any finance company's notes were made to me. I think they were made to the company's own order and endorsed.

Q. By the company in blank?

A. By the company in blank.

Q. They were given to you first as a transaction with you individually?

A. Some of them were. I cannot say which of them.

Q. Can you fix the dates of the several transactions that you have mentioned in addition to those mentioned by Mr. Miner by which it is claimed that some of these bonds are now held as collateral by other persons?

A. In the case of Dr. Jillson I think the transaction was had in March, 1887, or in that vicinity.

Q. How much money did Dr. Jillson furnish?

A. A little less than $8,000.

Q. Did that money go to the finance company?

A. It did go to the finance company.

Q. Was it cash?

A. It was cash.

Q. And the obligation of the finance company held by Dr. Jillson is yet unpaid?

A. The obligation, I think, is my own to Dr. Jillson, given for the account of the American Finance Company, and I gave a receipt for the collateral, stating what they were for.

Q. Can you mention any other dates than those of Jillson's transaction?

A. In the cases of Day and Bristol, I think, May, 1888, and G. A. Scott and C. A. Hopkins about the same time. Those are all that I gave, I believe.

Q. Well, Day and Bristol had that transaction personally with you in regard to bonds which you individually claimed?

A. Yes.

Q. So with regard to the others?

A. So with regard to Scott and Hopkins.

443 Q. Is anybody on that list except Watson a shareholder in the American Finance Company?

A. Yes.

Q. Which?

A. Scott.

Q. Is Bristol one?

A. No, sir.

Q. How long has Scott been a shareholder?

A. I should think five or six years.

Q. Did any of the persons with whom those loan transactions were had or sales made know that there was a dispute at the time as to the ownership of the bonds?

A. I am unable to say how that is, but they all know now.

Q. How long ago were they informed certainly?

A. Well, I should say during last summer or autumn possibly.

Q. Did either of them know at the time of the transaction with them that there was a foreclosure proceeding pending?

A. I do not think they did.

Q. With regard to Mrs. Church, do you know whether she has attempted to collect the interest on the January coupons on her bonds?

A. I have paid her the interest. We are content with our title to the bonds and we will make good anybody that holds any bonds as collateral or otherwise.

Q. So with regard to these other purchasers of bonds from you or the finance company, haven't they presented their coupons as they have fallen due?

A. Yes.

Q. And the money has been furnished by you or the finance company?

A. Yes; I paid them.

Q. Was any obligation of that sort entered into by you at the time of the transaction?

A. No, sir.

Q. Nothing was said to the purchaser or lender as to the dispute of the title to the bond or the pendency of the foreclosure proceedings?

A. I do not know as to the pendency of the foreclosure proceedings. I do not know that they did. However, I think they all know now.

444 Q. But there was nothing said to the purchaser or lender as to a dispute of the ownership of the bonds?

A. No, sir.

Q. Did any of the purchasers or lenders know at the time of his or her transaction that the company was in default in the payment of its interest?

A. Yes, sir; they all did, I think. They all knew the road was in the hands of a receiver.

Q. And was in default in the payment of its interest?

A. Yes.

Q. Did Mrs. Church know of the default at the time she paid them 7½ for the bonds?

A. I do not know; perhaps not; but there is no default so far as she is concerned as between her and us.

Q. Can you now inform us who was the holder of the bonds now held by Mr. Cannon, produced here this morning—the five bonds?

A. I cannot from any data that I have at the moment. I do not remember the numbers.

Q. Were you and Watson the only shareholders in the finance company to whom a dividend of any of the 82 bonds was made?

A. No; there were others.

Q. What became of their bonds which went to the others?

A. They were distributed and were held by whoever holds them now.

Q. But the finance company never had but 82 bonds?

A. The finance company had 85 bonds.

Q. Where did they get the three in addition to the 82?

A. By the terms of the tripartite agreement Brown was to have the right to build the extension from the Lake Erie & Western track in Findlay to the L., B. & W. track, a mile and a quarter, out of the money which they furnished—the $325,000—and Brown was to have 25 bonds himself when the track was laid. Those 25 bonds were issued to him by Mr. White as president and delivered to him, and in conformity with his contracts with us he came to pay us our ten per cent. commission.

445 Mr. FOWLER: Brown did?

A. Brown did, on the 25 bonds; as there were no $500 bonds, he gave us three bonds for our commissions under the contract.

Q. 85, then, is the full number? Can you give the numbers of those three bonds?

A. I do not know whether they are in the numbers I have read or not. I have no means of determining that.

Q. They were numbered above 800, weren't they?

A. I think so, but I am not sure.

Q. Well, now, do you suppose that if you have not already furnished a list of 80 numbers of bonds upon this inquiry you can furnish the numbers in full of the 80 bonds?

A. I think I have furnished 80 numbers. I think so.

Q. Well, now, to what other persons—shareholders of the finance company—was a dividend of these bonds made besides yourself and Watson?

A. J. A. Scott; he received two bonds, both of which I bought, and one of which has been delivered and the other is held for a balance of purchase money. Homer H. Stewart's estate received two bonds.

Q. Did you buy them?

A. No.

Q. Who else?

A. I do not call to mind any others that have bonds.

Mr. FOWLER: Is not that all the stockholders that have bonds?

A. I think so.

Q. Who was your vice-president at that time? Mr. Negley, didn't he have some bonds?

A. No, sir.

Q. Didn't Mason and Jillson have some bonds?

A. No, sir; they were so little time in the company that theirs was paid to them in money.

Mr. HARRISON: That is all.

Mr. FOWLER: I want to ask a question. You say, Mr. Short, that the American Finance Company paid Mason & Jillson their
446 share of the dividend which would have been accruing in Toledo, Columbus & Southern Railway bonds in money?

A. That is my recollection.

Q. You are sufficiently familiar with the issue of bonds of the Toledo, Columbus & Southern railway, perhaps, to state that the bonds which were produced yesterday by the American Loan & Trust Company as collateral for the Ashley notes were the bonds which were originally delivered to T. P. Brown for the extension and by T. P. Brown sold to the Hocking Valley Railroad Company, are you not?

A. I think I am.

Q. And that is the fact?

A. That is the fact.

Q. What is the date of the transaction with Brown when he gave you the three bonds as commission?

A. I think it was in the autumn of 1885; perhaps some time in October, 1885.

Q. Brown then knew that your company had the 80 bonds, did he not?

A. He did; he saw them delivered to us if he did not deliver them himself; I do not remember how that was.

Q. Mr. Short, you speak of commissions to the finance company; these bonds having been received as commissions. Do you mean commissions under the agreement of April 14, 1884, as modified by the tripartite agreement?

A. Brown understood the contract betweeen us to be that whenever any of these bonds issued by the Toledo, Columbus & Southern Railway Company were used for any purpose we were to have our ten per cent. commission, and in recognition of that he came to us voluntarily and delivered to us three bonds for the commission on the 25 bonds which he himself took.

Mr. HARRISON: I move to have stricken out the remarks of the witness in regard to what Mr. Brown understood. I am not referring to the three bonds merely, I am referring to the 80 bonds as well.

(Question re-read and witness answers:) A. I mean to say
447 that the bonds were delivered to us in payment of our commission under the two contracts.

Q. The dates of which I have just mentioned?

A. The dates of which were April 14th and September 24, 1884.

Mr. HARRISON: That is all.

Mr. FOWLER: Well, Mr. Short, is not it a fact that T. P. Brown never paid anything for the Toledo & Indianapolis bonds which he claims?

Mr. HARRISON: I object to that question as being irrelevant, immaterial, and incompetent.

A. So far as I have information concerning the construction of the Toledo & Indianapolis road I am forced to the conclusion that Mr. Brown had no interest whatever in those bonds.

Mr. HARRISON: I move to have that answer stricken out as irresponsive and incompetent, his testimony being a mere guess based upon information which he does not disclose and which could not be given, being hearsay.

Q. Did not your company take up all those 800 bonds from the holders, Mr. Short?

A. It did.

Q. And those bonds had been issued to the then holders by the Toledo & Indianapolis railroad?

Mr. HARRISON: I object. That is your understanding of it?

A. That is my understanding of it.

Hearing adjourned by the master to meet in Cleveland on Monday, the 18th inst

448 (RESPONDENT AMERICAN FINANCE CO.'S EXHIBIT A. Filed M'ch 12th, 1889. A. J. Ricks, Sp'l Master.)

THE AMERICAN LOAN AND TRUST COMPANY, Complainant,
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

This 1st day of March, 1889, this case came on before the Hon. Howell H. Jackson on the motion of Rowland N. Hazard, The American Finance Company, J. C. Short, E. A. White, M. D. Stuart, Mare E. Short, M. E. Goodwin, W. Life, C. H. Short, E. M. Church, and J. M. Ashley to set aside the sale of the property made in this cause and the confirmation thereof, said motion having heretofore been filed in this cause on the 15th day of February ult., and notice of which was duly given, and having been continued from the 28th February to this day.

Whereupon, upon consent of parties on both sides, by counsel, the petitioners being represented by D. C. Briggs, Esq., and Messrs. Pilcher & Weaver, and the purchasers of said property and said defendant being represented by the Hon. S. Burke, it is ordered by the court that the hearing of the said motion be continued until the 19th day of March, 1889, at the city of Cleveland, Ohio, without prejudice of any kind to any of the rights of the parties to the cause; and it is further ordered by the court, upon such consent, that the rights of all parties shall remain *in statu quo*, and shall on said 19th day of March or until the hearing of this motion be and remain just what they are now; and it is further ordered on such consent that the petitioners be, and they are hereby, restrained and enjoined from making any disposition on any part of the bonds and stock claimed by them in this cause, and that the pur-

449 chasers of said property and all other parties to the litigation be enjoined and restrained from disposing of the property purchased heretofore in this cause and from taking any other step that may prejudice or change the rights of petitioners as they now stand. It is further ordered, upon such consent, that petitioners shall present on or before the 10th day of March, 1889, such affidavits, documents, and other proofs as they may desire to use in aid of their said petition, and that copies thereof shall be served upon the defendant in said petition or their attorneys on or before said day of filing, and that the defendants and said purchasers have leave to reply to such affidavits, documents, and other proof by serving on petitioners or their attorneys, Messrs. Swayne, Swayne & Hayes, of Toledo, Ohio, such replying affidavits, documents, and proof as they may be advised on or before the 16th day of March, 1889, and that the said petitioners may read upon the hearing of this petition any other additional affidavits or documents that they shall be advised may be necessary in reply to any new facts or allegations alleged and set forth in said replying documents or proof; said additional affidavits, etc., to be filed on or before the hearing on the morning of the 19th.

450 "EXHIBIT B 1"

is the large printed volume containing the record of proceedings in the U. S. circuit court in and for the southern district of New York.

451 RESPONDENT'S EXHIBIT B 2 OF MARCH 12TH, '89. A. J. Ricks, Sp'l Master.

At a circuit court of the United States of America for the southern district of New York in the second circuit, held at the courthouse, in New York, on the 12th day of May, 1887.

Present: The Honorable William J. Wallace, judge.

THEOPHILUS P. BROWN, Complainant,
vs.
THE AMERICAN FINANCE COMPANY, Impleaded with Others, Defendants. } In Equity.

This action having been removed into the said circuit court of the United States and the complainant having then brought on his motion for an injunction *pendente lite*, as directed by the order to show cause granted before removal by a justice of the supreme court of the said State of New York on the 23rd day of February, 1886, and the complainant having read and filed his affidavit and papers in support of the motion, and the defendant American Finance Company having appeared and opposed said motion and having read and filed its affidavits and papers in opposition thereto, and counsel for the respective parties having been duly heard, and due deliberation having been had, it is now hereby ordered that said motion for an injunction be, and the same hereby is, denied.

(Signed) WM. J. WALLACE.
TIMOTHY GRIFFITH, *Clerk.*

452 (RESPONDENT AMERICAN FINANCE CO.'S EXHIBIT C. Filed March 12th, 1889. A. J. Ricks, Sp'l Master.)

At a term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city of New York, on the 9th day of June, 1887.

Present: Hon. William J. Wallace, circuit judge.

Circuit Court of the United States for the Southern District of New York.

THEOPHILUS P. BROWN, Complainant,
against
THE AMERICAN FINANCE COMPANY, THE American Loan and Trust Company, and Others. } In Equity. Order of Dismissal on Plaintiff's Own Motion.

This cause being at issue by the general replication and before any proofs for final hearing taken by any party to the cause, comes

the complainant and asks leave to dismiss his bill as of course upon payment of costs, and after hearing counsel for the complainant and counsel for the defendant American Finance Company the court doth order that the complainant's bill stand dismissed out of this court, after payment by the plaintiff to the defendant The American Finance Company of the costs of said defendant to be taxed and of the damages sustained by the said defendant for which the complainant is or his sureties are liable under the bond upon injunction heretofore granted in this cause at the instance of the said complainant.

453 Let it be referred to John A. Shield-, Esquire, of New York city, who is hereby appointed special master *pro hac vice* in this cause to examine, ascertain, and report the amount of the damages sustained by the said defendant The American Finance Company by reason of the said injunction, and for the payment of which to the said defendant the complainant is or his sureties are liable as aforesaid upon the said bond given as security in the sum of one thousand dollars.

And let the special master make report of his said examination and file the same with the clerk of this court with all convenient speed, any exceptions to the master's report to be heard by the court.

WM. J. WALLACE.

454 (EXHIBIT D.)

At a term of the circuit court of the United States for the southern district of New York, held in the post-office building, in the city of New York, on the — day of December, 1888.

Present: Hon. William J. Wallace, circuit judge.

Circuit Court of United States for the Southern District of New York.

THEOPHILUS P. BROWN, Complainant, *against* THE AMERICAN FINANCE COMPANY, ISRAEL B. Mason, Francello G. Jillson, John Doe, Richard Roe, The American Loan and Trust Company, and The Toledo, Columbus and Southern Railway Company, Defendants.	In Equity. Order Absolute of Dismissal on Complainant's Own Motion.

This cause being at issue by the general replication and before any proofs for final hearing by any party to the cause, came the complainant and asked leave to dismiss his bill as, of course, upon payment of costs, and counsel for the complainant and for the defendant The American Finance Company having been heard on said motion, and an order of this court having been thereupon made, which is dated June 9, 1887, and was entered June 21, 1887, that the complainant's bill stand dismissed out of this court after

payment by the complainant to the defendant The American Finance Company of the costs of the said defendant to be taxed and of the damages sustained by the said defendant, for which the complainant was or his sureties were liable under the bond upon injunction theretofore granted in this cause at the instance of said complainant, and the said damages having been, by the special
455 master by said order appointed and to whom it was thereby referred, ascertained and reported to amount to the sum of one thousand dollars, and the said costs having been adjusted by the clerk at the sum of one hundred and thirty-five $\frac{97}{100}$ dollars, and the said sums, aggregating one thousand one hundred and thirty-five $\frac{97}{100}$ dollars, having been paid by the complainant to the said defendant The American Finance Company, as by said order required:

Now, therefore, upon motion of Burton N. Harrison, Esquire, of counsel for the complainant, and Robert Ludlow Fowler, Esquire, of counsel for said defendant The American Finance Company, hereto in writing consenting, and due deliberation having been had, it is—

Ordered that the complainant's bill stand dismissed out of this court.

It is hereby consented that the foregoing order of absolute dismissal of complainant's bill out of this court be made and entered on complainant's own motion.

Dated New York, December 4, 1888.

ROBT LUDLOW,
Sol'r for A. F. Co.
BURTON N. HARRISON,
Complainant's Solicitor.

456 (RESPONDENT AMERICAN LOAN & TRUST COMPANY'S EXHIBIT E. Filed March 12th, 1889. A. J. Ricks, Sp'l Master.)

$2,000.00. NEW YORK, *April* 7, 1888.

On demand, for value received, I promise to pay to American Loan & Trust Company of New York or order, at the banking-house of said company, in funds current at N. Y. clearing-house, two thousand dollars, with a sum equal to six per cent. interest for the time said money remains unpaid as an agreed compensation for making such advance, having pledged to said company as collateral security $5,000 first-mortgage bonds of the Toledo, Columbus & Southern R'y Co., with authority to said company to sell the same without notice, on non-performance of this promise, in such manner as said company or its president or secretary or treasurer may deem proper, either at the brokers' board or at public or private sale, applying the net proceeds to the payment of this note, including the above compensation, and accounting to me for the surplus, if any. In case of deficiency I promise to pay to said trust company forthwith after such sale the amount remaining due hereon.

In case of depreciation in the market value of the security hereby pledged or which may hereafter be pledged for this loan a payment is to be made on account, or additional security satisfactory to the company shall, at the company's option, be deposited with said company, so that the market value of the securities shall always be at least 20 per cent. more than the amount unpaid of this note. In case of failure to do so this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the said company may immediately reimburse itself by sale in the manner aforesaid of all the above security, and it is hereby agreed and understood that any excess of security upon this note shall be applicable to any other note or claim held at the time of default by said company against me.

(Signed) J. C. SHORT.

457 (RESPONDENT AMERICAN LOAN & TRUST CO.'S EXHIBIT F. Filed March 12th, 1889. A. J. Ricks, Sp'l Master.)

$15,000.00. NEW YORK, *March* 22, 1887.

On demand, for value received, I promise to pay to American Loan & Trust Company of New York or order, at the banking-house of said company, in funds current at N. Y. clearing house, fifteen thousand dollars, with a sum equal to 6 per cent. interest for the time said money remains unpaid as an agreed compensation for making such advance, having pledged to said company as collateral security nineteen (19) bonds 1 M ea. Toledo, Columbus & Southern R'y Co., with authority to said company to sell the same without notice, on non-performance of this promise, in such manner as said company or its president or secretary or treasurer may deem proper, either at the brokers' board or at public or private sale, applying the net proceeds to the payment of this note, including the above compensation, and accounting to me for the surplus, if any. In case of deficiency I promise to pay to said trust company forthwith after such sale the amount remaining due hereon.

In case of depreciation in the market value of the security hereby pledged or which may hereafter be pledged for this loan a payment is to be made on account, or additional security satisfactory to the company, shall, at the company's option, be deposited with said company, so that the market value of the securities shall always be at least 20 per cent. more than the amount unpaid of this note. In case of failure to do so this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the said company may immediately reimburse itself by sale in the manner aforesaid of all the above security; and it is hereby agreed and understood that
458 any excess of security upon this note shall be applicable to any other note or claim held at the time of default by said company against me.

(Signed) J. M. ASHLEY.

459 (RESPONDENT AMERICAN LOAN & TRUST COMPANY'S EXHIBIT G. Filed March 12th, 1889. A. J. Ricks, Sp'l Master.)

$10,000.00. NEW YORK, *March* 21, 1887.

On demand, for value received, I promise to pay to American Loan & Trust Company of New York or order, at the banking-house of said company, in funds current at N. Y. clearing-house, ten thousand dollars, with a sum equal to 6 per cent. interest for the time said money remains unpaid as an agreed compensation for making such advance, having pledged to said company as collateral security in addition to that already pledged eight (8) bonds of $1,000 each of the Toledo, Columbus & Southern Rlrd., with authority to said company to sell the same without notice, on non-performance of this promise, in such manner as said company or its president or secretary or treasurer may deem proper, either at the brokers' board or at public or private sale, applying the net proceeds to the payment of this note, including the above compensation, and accounting to me for the surplus, if any. In case of deficiency I promise to pay to said trust company forthwith after such sale the amount remaining due hereon.

In case of depreciation in the market value of the security hereby pledged or which may hereafter be pledged for this loan a payment is to be made on account, or additional security satisfactory to the company shall, at the company's option, be deposited with said company, so that the market value of the securities shall always be at least 20 per cent. more than the amount unpaid of this note. In case of failure to do so this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the said company may immediately reimburse itself by sale in the manner aforesaid of all the above
460 security; and it is hereby agreed and understood that any excess of security upon this note shall be applicable to any other note or claim held at the time of default by said company against me.

(Signed) J. M. ASHLEY.

461 (RESPONDENT AMERICAN LOAN & TRUST COMPANY'S EXHIBIT H. Filed March 12th, 1889. A. J. Ricks, Sp'l Master.)

$14,000. NEW YORK, *Oct.* 1*st*, 1888.

On demand, for value received, the American Finance Co. promises to pay to the American Loan & Trust Company of the City of New York or order, at its office, in New York city, in funds current at the New York clearing-house, with interest from the date hereof at the rate of six per cent. per annum, fourteen thousand dollars, having deposited with the said company as collateral security for the payment of this and any other liability or liabilities of the undersigned to the said company, due or to become due or which may hereafter be contracted or existing, the following property, viz., 20

M bonds Toledo, Columbus & Southern, first mortgage, of an estimated market value of $——, and the undersigned agree to deliver to the said company additional securities to its satisfaction should the market value of the said securities as a whole suffer a decline of five per centum.

On the non-performance of this promise or upon the non-payment of any of the liabilities above mentioned or upon the failure of the undersigned forthwith, with or without notice, to furnish satisfactory additional securities in case of decline as aforesaid, then and in either such case full power and authority are hereby given to said company to sell, assign, and deliver the whole of the said securities or any part thereof or any substitutes therefor or any additions thereto or any other securities or property of the undersigned in the possession of the said company for safe keeping or otherwise at any brokers' board or at public or private sale, at the option of said company or of its president or secretary, without either advertisement or notice, which are hereby expressly
462 waived. If such securities or property are sold at public sale, the said company may itself purchase the whole or any part thereof free from any right of redemption on the part of the undersigned, which is hereby waived and released. In case of sale for any cause, after deducting all costs or expenses of every kind for collection, sale, or delivery, the said company may apply the residue of the proceeds of the sale or sales so made to pay one or more or all of the said liabilities to the said company, as it or its president or secretary shall deem proper, whether then due or not due, making proper rebate for interest on liabilities not then due, and returning the overplus, if any, to the undersigned, who agree to be and remain liable to the said company for any deficiency arising upon such sale or sales. The undersigned do hereby authorize and empower the said company, at its option, at any time to appropriate and supply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in the hands of the said company, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

AMERICAN FINANCE CO.

(Signed) J. C. SHORT, *Pt.*

Attest:

[SEAL.] (Signed) W. A. MINER,
Assistant Sec'y.

463 (PETITIONERS' EXHIBIT I. Filed March 12th, 1889, by Request of Mr. Harrison. A. J. Ricks, Sp'l Master.)

No. 2927.

American Loan & Trust Co.

Loaned $2,000.00 to J. C. Short.

Date, April 7, 1888, on call, at 6 per cent.

Collaterals.	Amount at par.	Market value.
5 M 1st-mtg. bonds Toledo, Columbus & Southern Railway Co.		@ 80 $4,000 00

J. S. THURSTON, *Secretary.*

(PETITIONERS' EXHIBIT J. Filed M'ch 12th, 1889, by Request of Mr. Harrison. A. T. Ricks, Sp'l Master.)

No. 2687.

American Loan & Trust Co.

Loaned $14,000.00 to Am. Finance Co.

Date, Sept. 13, 1887, on call, at 6 per cent.

Collaterals.	Amount at par.	Market value.
20 M first-mtg. bonds Toledo, Columbus & Southern R. R.		20,000

(Signed) J. C. C.,
Ass't Secretary.

464 (EXHIBIT K. Filed M'ch 13th, 1889. A. J. Ricks, Sp'l Master.)

J. A. Jillson	10	8,000	699 to 708, incl.
Wm. Life	2	1,500	714 & 718.
F. Beach	2	1,500	722 & 723.
L. H. Wilson	1	900	740.
S. Clarke	2	1,500	713 & 716.
Rob't Blake	1	900	739.
Geo. B. Barnes	1	400	742.
H. Hamlin	1	500	771.
J. B. Mott	2	2,000	715 & 772.
J. A. Sperry	10	10,000	719, 724, 743, 767, 768.
" "	--	------	769, 773, 774, 780, 781.
E. M. Church	2	------	720 & 721.

465 (EXHIBIT L, MARCH 13, 1889.)

Memorandum of agreement made this twenty-first day of March, 1887, between the Columbus, Hocking Valley and Toledo Railway Company, of the first part, and Rowland N. Hazard, of the second part, witnesseth:

That the said party of the first part in consideration of the promises and agreements hereinafter contained, hereby agrees to sell and assign to the said Rowland N. Hazard, all its right, title, interest and property in or to or under and by virtue of a certain agreement, a copy of which is hereto attached, bearing date the 10th day of December, 1885, between T. P. Brown, of Toledo, Ohio, and the said The Columbus, Hocking Valley and Toledo Railway Company, and in consideration thereof the said Rowland N. Hazard, party of the second part, agrees to pay unto the said The Columbus, Hocking Valley and Toledo Railway Company the sum of one hundred and forty thousand dollars in cash; forty thousand dollars on the execution of this memorandum and one hundred thousand dollars on or before the fifth day of April, 1887, and also covenants, promises and agrees to and with the party of the first part that the said party of the second part shall and will indemify and save harmless the said The Columbus, Hocking Valley and Toledo Railway Company, its successors and assigns, against the said contract with Brown dated the 10th day of December, 1885, and from and against the covenants and agreements of the said railway company in said contract contained and from and against any and all suits and actions, whether well founded or otherwise, and all cost, loss, and damage arising therefrom or by reason thereof.

For the same consideration the party of the second part hereby covenants and agrees that the railroad of the Toledo, Columbus and Southern Railway Company, a large amount of whose stocks
466 and bonds are covered by the said contract of December 10th, 1885, shall not be extended nor shall any branch thereof be built, either by the said company or by or in the name

of any other company in its interest, to or through any point which shall be east of the meridian of Toledo.

It is covenanted and agreed that until the full payment of the said sum of one hundred thousand dollars, herein agreed to be paid on the fifth day of April, the party of the first part shall hold the said contract of December 10th, 1885, and all right, title, interest and property therein, thereunder or by virtue thereof, as security for the payment of said sum, and that in case of default by the party of the second part in the payment thereof, or any part thereof, as and when the same shall become due according to the terms thereof, the party of the first part shall be at liberty to consider this contract as forfeited and annulled and to retain all sums which shall then have been paid hereunder as liquidated damages.

In witness whereof, the party of the first part has caused these presents to be signed by its president, and the party of the second part has hereunto set his hand and seal the day and year first above written.

(Signed) COLUMBUS, HOCKING VALLEY & TOLEDO R. R. CO.,
By JOHN W. SHAW, *President.*
R. N. HAZARD. [SEAL.]

467 The following are extracts from Exhibit "B:"

Narragansett hotel, L. H. Humphreys, lessee.

PROVIDENCE, *Sept.* 16, 1884.

Hon. T. P. Brown, Whately, Mass.

MY DEAR SIR: I arrived here this morning and on reaching Mr. Jillson's office found him and Mr. Mason busy revising and correcting the typewriter copy of their proposition for the $325,000 loan which I enclose herewith. It is in response to our formal request that they take the loan and is much more favorable that I expected in its terms.

They know the terms of our company's agreement with you, and from the tenor of their talk this morning I feel more than ever assured that if you and they shall trade in this case you will not only get your present money, but they will form or join a syndicate to extend the line to Columbus. I find them "way up" to-day on the outlook for the property. If they are encouraged and cultivated they will, undoubtedly, be valuable allies a little later on.

Taking up the points of their proposition: The notes were intended to run one year from July 1, '84. Mr. Mason thinks you ought to have more time to make sure of not having to need an extension, altho' he believes that under our plan, as disclosed in our agreement with you, the new Co. can organize, get out its bonds, and market them before July 1, '85, unless something now unforseen shall prevent; but for the am't he will take himself he
468 practically proposes to "enlist for the war," and thinks his associates will probably feel the same way, hence his suggestion of more time. He has arrived at that conclusion, it seems,

since Saturday, when the typewriter draft was probably prepared. His idea is for you to make new notes, dating them when made and having them read "on or before ——, 1886," &c., so as to allow you to pay them whenever you like.

The "application" of the proceeds of the loan seems to be all right, and, as I read it, will cover Dowling as well as all others. They have provided for the purchase of the claim in the interest of all the bondholders, including T. P. B. That was my suggestion to Mr. Jillson, having in view your and our interest in them, and I see he has put it in, and that preserves all equities in the bonds.

I presume they would want the $360,000 of stock (45% of $800,000) issued in the name of some person or persons nominated by them, and would expect that the remainder would be issued in your name. I see that in order to secure you in a majority of the stock they have "appropriated" our 10% of it to you. This I construe to be very significant of their satisfaction with you as the head of the enterprise and of their confidence in you personally. This arrangement, of course, leaves you in full control of the corporation.

The "bonus" on the loan to be paid in bonds at par is quite as small as I expected. I paid more than that on a number of loans I got for my Illinois road.

They have asked for Mr. White as receiver; you can arrange that with them to your mutual satisfaction, no doubt, when you meet them for a conference. They will agree with you as to the
469 manner of purchase of or payment for the Chicago claim and as to the general disbursement of the money. They only want to be prudent and careful.

They want all the bonds, so far as possible, to be deposited in one place, and have therefore proposed that all the bonds outside of the $650,000, which go with the notes, shall be left with a trustee to be agreed upon until it is known what the outcome is to be. These bonds can be withdrawn, of course, at any time that you and we and they agree.

Our company cannot afford, of course, for the little 2½% coms. on the loan, only, use its position and capital to set the road on its feet and take the risk of your death and any contingency that might otherwise arise, and hence we and Messrs. Jillson & Mason are treating the negotiation as a sale of the bonds, but in doing this our company extinguishes all its claims for coms, so far as the present portion of the road is concerned.

And so our company also puts its $80,000 bonds in trust along with ours and theirs, and we will not be entitled to any coms. on the bonds of the new company to be issued to take up the old.

No doubt there will be points for you and them to discuss as to detail, and I have arranged for them to be here to see you when you come, and I feel sure you will find them square, prompt, and reasonable. They are nor professionals nor experts.

I do not hesitate to advise you to accept their terms, for I do not believe anybody would offer better, and they are ready to "put up" just as soon as the requisite details can be agreed upon with you

and they can get their associates together—the work of a few days.

470 I now expect to be at Hotel Northampton Thursday evening, and when I find out just when I will be there I will telegraph you at South Deerfield or such other address as you may give me.

Sincerely yours, J. C. SHORT, *Pt.*

WHATELY, MASS., *Sept.* 17, 1884—4.30 p. m.

DEAR SHORT: I have just opened yours of yesterday, with Jillson and others' proposition enclosed, and, as the mail closes in five minutes, will reply only — few words. I have not looked over the proposition yet; only read enough of your letter to know when to expect you at Northampton. The best hotel there is the "Mansion house." Wire me early enough, so that I can get it over from South Deerfield in time to leave here on the last evening train, 4.40 p. m. South. Will look over proposition at once and meet you at the Mansion house in Northampton, Mass., soon as you notify me. My mother is quite sick to-day, but think she will be all right to-morrow morning. In haste.

Yours, &c., T. P. BROWN.

P. S.—If you can say how long you will be at Northampton in your despatch, say so.

(Endorsed:) T. P. Brown. Sept. 17, 1884.

471 EXHIBIT C.

Cross-examination by Mr. BLAIR:

Q. Mr. Brown, how many bonds of the Toledo, Columbus & Southern Railway Company did you ever have in your possession?

A. I cannot remember exactly, but I think twenty-seven.

Q. Where did you get them?

A. I got them from the American Finance office of New York.

Q. When?

A. It was the latter part of 1886; I don't think I could name the day of the month.

Q. Was it as late as December, 1886?

A. Well, I could not say; it was up into cool weather.

Q. Was it in October, 1886?

A. Well, I could not say positively; it was the latter part of the year.

Q. Do you remember what was the occasion of your being in New York at that time?

A. I don't recall now the particular business I had there at the time.

Q. Did the Toledo, Columbus & Southern Railroad Co. have an office in New York?

A. Not to my knowledge.

Q. Did they ever have an office there?

A. Not that I know of.

Q. Did you have any other business that you can recall except with the American Finance Company on that occasion?

A. I think I went there to pay the interest on my notes, and if that was the time it must have been, I think, about December that I was there. I can't state the date positively without referring to papers which I have not here with me.

Q. Whom did you see at that time?

A. At what place do you refer to?

Q. At the office of the American Finance Company.

A. Why, I don't remember all I saw; I saw Mr. White and Mr. Short, and Mr. Mason, of Providence.

472 Q. Anybody else?

A. I don't recollect particularly whom I did see.

Q. Do you remember anything said about interest on your bonds or your notes?

A. I don't recall anything particularly except that I went there to pay interest on the notes.

Q. Did you pay the interest on the notes?

A. I paid the interest at the office of the Central Trust Company; did not pay them at the American Finance office.

Q. The office of the Central Trust Company?

A. Yes, sir; my money was there which I used to pay the interest.

Q. Then you did not go to the office of the finance company to pay the interest?

A. No; they didn't have the paper.

Q. What did you go to the office of the finance company for?

A. I went after my bonds.

Q. Tell us what was said when you got there.

A. Well, that would be a pretty hard matter.

Q. Anything you remember?

A. I don't remember particularly anything. Mr. Short had agreed to——

Q. No, never mind "Mr. Short had agreed." I have not asked for that.

A. I was going to explain.

Q. I want to know what took place there.

A. I don't remember what took place.

Q. Have you no recollection whatever as to what took place?

A. Why, yes; I presume I could recall what took place if I could think it up.

Q. How long since you thought of it?

A. I don't know.

Q. Do you remember when you were examined here a few weeks ago what took place?

A. Yes, sir.

Q. Have you forgotten it since then?

A. I don't know whether I have or not.

Q. You don't know whether you have forgotten it or not?
473 A. I can tell better when you question on it.
Q. I have asked you what took place.
A. I don't remember. If you will ask me any particular thing I can perhaps recall it.
Q. I ask you for anything that you remember that took place at that interview.
A. I don't recall anything particular.
Q. Do you remember nothing that you said?
A. I don't now.
Q. Do you remember anything that anybody else said?
A. I don't recollect anything now.
Q. Is your mind an entire blank as to that entire interview?
A. No, sir.
Q. Then tell anything that is in your memory.
A. I don't recall anything just now.
Q. How were you able to state when you were examined on the direct what took place?
A. I suppose the questions were asked in such a way that I could tell; that reminds me of certain things that were done. This, you will remember, was five years ago nearly—four years ago.
Q. You were asked upon direct this question: "Now, give the facts about the delivery of those bonds—all about it," and to that question you answered——
Judge BURKE: Very well, what did he say before, if you want to ask him about it?
Mr. BLAIR: I don't propose to ask him what he said before; I ask him to give the facts.
WITNESS: I answered you then that those bonds were delivered to me by Mr. Short in the finance office.
Q. Did you say in answer to that question upon direct that the bonds were delivered to you by Mr. Short?
A. I think that they were delivered to me in that office. Mr. White and Mr. Short were both there.
Q. And Mr. Mason?
474 A. And Mr. Mason—no; Mr. Mason was not there at that time; he came the next day. I saw him the next day, I think, in that office.
Q. You think now you were mistaken when you said Mr. Mason was there?
A. No; I was not mistaken. You didn't ask me when. I said I saw him there; was in there two or three times, two or three different days. The first day Mr. Mason was not there and the second day he was.
Q. Was that the next day after the first interview that Mr. Mason was there?
A. I don't remember whether it was the next day or the next day after that. I telegraphed him to Providence to come over to see Judge Doyle, and at a certain time Judge Doyle was with me from Toledo in the office. I recall that now. I don't remember what day that was, whether it was the first day or the second or third.

Q. Now, have you given all the facts about the delivery of those bonds? Have you told all about it?

A. Well, that is a question I refuse to answer. I don't remember four years back, whether I have told all that occurred there or not. I never want to be led into any such question as that by anybody. If you want to know anything ask it and I will answer it.

Q. Have you stated all that you remember about that interview?

A. I don't recall now whether I have or not.

Q. Please state now all that you remember of that interview.

A. I presume there was a great deal said. I was there some time, but I don't recollect now. I may think it up as you proceed.

Q. I am waiting for you to think it up?

A. I don't recollect anything now.

Q. You don't recollect anything?

A. No.

Q. You don't recollect the fact that the bonds were delivered
475 to you?

A. I stated in answer to the first question the bonds were delivered to me.

Q. By whom personally were the bonds delivered to you?

A. I think by Mr. Short, but Mr. White was there at the time.

Q. Where did Mr. Short get the bonds from?

A. I don't remember.

Q. Did you see them obtained?

A. No.

Q. Did Mr. Short go out of the room to get them?

A. No; I think that he sent Mr. White for them.

Q. How many times have you been to the office of the American Finance Company?

A. I don't remember how many.

Q. Several?

A. Yes, sir; a good many times.

Q. Approaching their office you pass through a hall?

A. Yes, sir.

Q. Toward Broadway?

A. Yes, sir.

Q. Is not the office of the finance company at the left, at the end of the hall?

A. It is on both sides; it was at that time on the right and left, both.

Q. Was not the office of the Toledo, Columbus & Southern Railroad Company at the right hand?

A. Not that I know of.

Q. Was not the name of that company on the door of the room that you entered, turning to the right.

A. Not that I know of.

Q. You never observed it?

A. Never observed it.

Q. Did you observe what was on that door?

A. I did not observe the name of the Toledo, Columbus & Southern Railway Company on any door.

Q. Did you observe what was on the door?

A. Well, I don't recall particularly. Which door do you mean? There was half a dozen doors.

Q. The door I have asked about.

A. Which one was that—on the right?

476 Q. Yes.

A. I don't remember seeing any name there.

Q. Which room did you enter on this particular occasion?

A. I don't remember, sir; there was an entrance way both ways.

Q. Did you not go into the right-hand room?

A. I don't think I did. I think I went into the secretary's office first. That is the usual entrance.

Q. Did you not go into the room on the right hand where Mr. White had his desk?

A. I don't think I did. That was not the usual entrance. The usual entrance was through the secretary and treasurer's office. That was a sort of reception-room.

Q. Did you have an interview on that occasion with Mr. White alone?

A. It may be that I had. I don't remember.

Q. Did you ask Mr. White for any bonds?

A. I think Mr. White and Mr. Short were together when I asked for the bonds.

Q. Are you able to say in which room they were?

A. In Mr. Short's room, I think. That would have been the usual place. He would have sent for Mr. White if I had went in his room.

Q. Do you remember whether he sent for Mr. White?

A. Well, no, not particularly; but I know that the bonds came there and that he did not leave the room to get them. They were handed to him.

Q. What did you say about those bonds on that occasion?

A. I don't remember now.

Q. Have you any memory on the subject?

A. Yes, sir.

Q. Give it.

A. I don't recall any words that I said.

Q. Give the substance of what you said.

A. At that time, I think, the bonds had been put into the hands of Mr. Short.

Q. No; I am not asking that.

A. Well, I am answering the question.

Q. That is not responsive to my question, and I ask to have it stricken out.

A. Strike it out if you want to.

477 The EXAMINER: The answer is hardly responsive.

Q. Give the substance of what you said.

A. I told Mr. Short that I had called for my bonds, they having

been put into the finance company's hands some two months previous to borrow some money for me to pay interest on my loan to Mason & Jillson; he had neglected—rather hadn't raised the money on my note with the bonds as collateral, and he said that it had been impossible for them to raise the money, and I told him that I would take the bonds, as I could arrange to pay the interest.

Q. Did you say to him as a part of that conversation that the bonds had been placed in their hands about two months previous to borrow money on them and that they had failed to raise the money—was that a part of what you said at the time?

A. Well, I don't recollect exactly, recollect the wording, but that was the conversation; he having failed to raise the money to pay the interest on my loan to Mason & Jillson that I would take the bonds and make my own arrangement.

Q. Was it true that the bonds for which you asked had been put into the hands of the finance company to borrow money for you to pay interest?

A. It was.

Q. When had they been put into the hands of the finance company?

A. I don't remember the exact time; two or three months, perhaps, previous to that.

Q. Who put them in their hands?

A. I did.

Q. How many bonds?

A. Thirty.

Q. Where did you get them?

A. Well, I had not seen the bonds, but I ordered them put there, I think, by letter; I don't remember exactly.

Q. To whom did you give the order?

A. Well, I think my correspondence was with Mr. Short,
478 and I had sent my notes for the amount and told him to put up my bonds with the notes if he could get the note discounted.

Q. Can you remember about when that was done?

A. Not exactly, but it must have been two or three months previous to that.

Q. What was the amount of the notes?

A. I think the one note was $10,000. I think there was another of $2,000.; I don't remember exactly. There was one note of $10,000. I may be mistaken as to the amount of the $10,000. I don't remember exactly whether it was borrowing just the amount due on the loan or whether it was an even thousand dollars. I have those papers at home. If I had them to refer to I could make it exact.

Q. You are entirely confident, are you, that it was in December you were there to pay the interest?

A. I am not fully confident it was in December, but I think it was.

Q. It was about that time?

A. Yes, sir.

Q. Had you ever had those bonds in your hands?

A. Not previous to that time.

Q. By that you mean when?

A. When they were delivered to me.

Q. And when you had receipted for them?

A. I don't remember, but I don't think I had receipted for them until I got them.

Q. Had they been issued by the railroad company?

A. Oh, yes.

Q. And delivered to whom?

A. They had not been delivered really, because I had not called for them. I had written to Mr. Short to ask them to use them as collateral to my paper.

Q. Have you any copy of that letter?

A. I don't remember; I think I have.

479 Q. You think you have?

A. I presume so.

Q. Have you it here?

A. No, sir.

Q. Do you remember whether in that letter you told Mr. Short how many bonds he should take?

A. I don't remember.

Q. Do you remember how much time Mr. Short had had in which to procure a loan for you to pay interest?

A. Well, the interest was due September 24th. I think that would leave it about three months, as near as I can recollect, if it was in December, as I think it was.

Q. Were you in New York in September?

A. I don't remember.

Q. How many bonds did Mr. Short deliver to you?

A. I think 27.

Q. All at one time?

A. I think so.

Q. How came you to say he delivered to you 22 bonds?

A. I would like to correct that now, because I had forgotten at the time that there were five bonds due me under the first arrangement with the $800,000; after the division there were five bonds due me which I had neglected to call for.

Q. And had not received them?

A. I had not received them, and so that left thirty bonds due to me, but he kept three of them and delivered me 27.

Q. Did you sign any paper when they were delivered to you?

A. I don't remember, but I presume I did receipt for them.

Q. To whom?

A. To Mr. Short, I think.

Q. Have you any recollection of having ever signed any receipt for any bonds?

A. Yes, sir; I think I did.

Q. When?

A. At the time they were delivered to me.

Q. Before the loan was applied for?

A. No; at the time they delivered the bonds to me when I took them out of the office.

Q. What relation had Mr. Short to the Toledo, Columbus & Southern Railway Company?

A. None.

480 Q. Did you give a receipt to him for the railroad company for those bonds?

A. No, sir; I gave a receipt, a personal receipt; they were my bonds personally.

Q. If you gave any receipt to the railway company for the bonds it was given at some other time?

A. Well, I should not have receipted in the name of the railway company, as the company had nothing to do with those bonds; they were mine.

Q. The company issued them, didn't they?

A. Yes, sir.

Q. Issued them in payment for something, had they not?

A. Yes, sir.

Q. You think you did not give the railway company any receipt for them?

A. Well, as I said before, I don't remember whether I did or not. I don't remember distinctly of giving the receipt at the time they were delivered to me, although I am of the impression that I did, and yet I may have given a receipt before, when I first ordered the bonds to be given to the finance company.

Q. Were you in New York in October, 1885?

A. I think that I was in the early part of the month.

Q. Do you remember about what time in the month?

A. I don't remember exactly.

Q. Did you then visit the office of Mr. White?

A. Yes, sir; visited the office of the finance company.

Q. Do you remember what took place there at that time?

A. No; I do not. I had an appointment with Mr. Short and he was in Boston, and I waited some two or three days for him, to get him, and I presume that I called in there more or less every day to hear from him.

Q. But you didn't see Mr. Short?

A. I didn't see him. He came home Saturday night and went back to Boston early Monday morning before I could see him.

Q. You said 5 bonds were due you out of the $800,000.

481 What were the remaining 25 bonds due to you for?

A. The remaining 25 bonds were 25 bonds issued above 800 that were paid to the contractor for building the extension of the road from the Lake Erie & Western track over to the Central at Findlay.

Q. Who was the *the* contractor?

A. My brother.

Q. How came they to be all issued to you?

A. Because I had taken the contract and had authority to collect them.

Q. Did your brother build that extension?

A. No; but the contract was made with him.

Q. What did he do under it?

A. I don't remember exactly what he done.

Q. Did he do anything?

A. Well, he had no charge of it.

Q. Is it not true that those 25 bonds were issued to you in pursuance of a provision of the tripartite agreement?

A. They were issued to me—they were issued under the arrangement in that agreement at the rate of $20,000 per mile.

Q. Yes; and it was provided that inasmuch as the railroad was 41 miles and a little over in length $825,000 should be issued, of which $25,000 should be yours.

A. No, sir; it provided there should be $800,000 of bonds issued and then all over 40 miles should be issued in making the extension, and the road was 40¼ miles long at the time and $800,000 of bonds issued; then when we issued the bonds to cover the extension and it made a mile and a quarter of bonds—$25,000 of bonds.

Q. Two contracts were made with the contractors to build that extension, were they not?

A. Yes, sir.

Q. And your brother was not either of those?

A. No.

Q. And those contractors were paid cash?

A. Yes, sir.

Q. And that was done in pursuance of the tripartite agreement?

A. Yes, sir; they were paid cash out of my money.

482 Q. Out of money that was received from Mason & Jillson?

A. Yes, sir.

Q. Now, was not that $25,000 of bonds delivered to you pursuant to the provisions of the tripartite agreement?

A. They were; I suppose that was a part of the contract; the contract shows for itself.

Q. So that both the $25,000 and $5,000, making in the aggregate $30,000, you have mentioned came to you under the provisions of the contract?

A. They did.

Q. And if delivered upon an order of yours, so far as you know, they were delivered at the same time?

A. The 27 were delivered only.

Q. How were the 27 delivered?

A. To myself. When they came into my hands personally all I received was 27 bonds.

Q. How many did you order delivered to Short?

A. Why, I presume that I ordered all of them delivered—all that was to come to me.

Q. Without distinction?

A. I don't remember that I did; I can't recall it without referring to my letter book.

Q. Did you at any time hear anything about the delivery of any other bonds of the Toledo, Columbus & Southern Railway Company?

A. I knew about the time the bonds were delivered to Mason & Jillson.

Q. When was that?

A. That was immediately after they were gotten out.

Q. When was that?

A. I don't remember distinctly, but I think perhaps in July.

Q. How many were delivered to Mason & Jillson?

A. I have no personal knowledge any were delivered except by letter or otherwise from Mr. White that as quick as they could deliver the bonds to Mason and Jillson the balance of the money would be paid over.

483 Q. Have you that letter?

A. I presume I have.

Q. Do you remember anything about the date of it?

A. I do not, but I think along about that time.

Q. In July?

A. I think so.

Q. Will you produce it to be attached to your testimony?

A. I will if I can find it.

Q. And send it to the master?

A. Yes, sir.

Q. Did you answer that letter?

A. I would like to state further that I do not refer to any particular letter, as these parties were very much behind in giving me the money which was to be paid to the finance company, and that same source of complaint went through a number of letters. I do not refer to any particular letter, and as quick as the bonds were delivered, as soon as they could be printed and executed, then the balance of the money was paid over.

Q. And then the bonds were delivered, were they?

A. Yes, sir.

Q. Do you know whether any receipt was given for them?

A. I do not.

Q. Did you ever see one?

A. I don't remember that I have.

Q. How many bonds did you understand to have been so delivered?

A. 650 bonds for security on the loan, and I think 65 as a bonus. I don't remember the exact number. I think that was it.

Q. Did you ever have any conversation with any officer of the railway company about the delivery of those bonds?

A. I presume I have, but I don't remember particularly.

Q. Did you ever have any conversation with them about the delivery of any bonds?

A. I don't recall any time.

Q. Will you immediately look at page 359 of Exhibit B at

484 the receipt under date "Toledo, Ohio, October 26th, 1885," and see whether you remember having signed that receipt?

A. Well, I could not say that I signed it without seeing the receipt itself. I have no doubt what I did sign that.

Q. Do you remember anything about it?

A. I do not particularly.

Q. It appears to have been signed at Toledo. Did you see Mr. White at Toledo October 26th, 1885, or about that time?

A. I don't remember, sir.

Q. Were any bonds delivered to you at Toledo, either personally or by mail?

A. There were not.

Q. About October 26th, 1885?

A. No, sir.

Q. Do you remember when you sent the order for the delivery of 30 bonds to Mr. Short you sent this receipt with it?

A. I don't remember.

Q. Is it probable that you did?

A. I can't say, sir, without having my letter book to refer to what was the transaction.

Q. Now do you remember you signed any other receipt for any bonds?

A. I don't remember.

Q. (Paper handed to witness.) Is that your signature?

A. Yes, sir.

Q. Is the date in your handwriting in the backing?

A. I don't know, sir. That is my signature.

Q. Can you tell whether the date was written with the same pen and at the same time and the same ink?

A. I could not tell; no. I presume it is.

Q. You have no doubt about it, have you?

A. I would not swear to that, but I believe that is my signature.

Q. Have you any recollection of signing that receipt?

485 A. I don't remember the exact time, but I do remember of signing this.

Q. Do you remember where you signed it?

A. I do not, but I think in Toledo.

Q. Do you remember what you did with it?

A. I presume that I sent it to Mr. White or Mr. Short.

Q. Have you any doubt that you sent it at the same time that you sent the receipt, a copy of which is at page 359 of Exhibit B?

A. Well, I could not say, but I presume that is a fact. They probably made out these and sent them on to me to sign—made them out in New York and sent them on to me to sign.

Q. Have you any doubt that they accompanied the order for the delivery of the bonds to Mr. Short?

A. I could not say, sir.

Q. You can't say whether you have any doubt or not?

A. I mean I can't remember.

Q. I do not ask that. I ask whether you have any doubt that they accompanied the order sent to the railroad company to Mr. White to deliver the 30 bonds to Mr. Short.

A. I presume it would be very natural it was all done at the same time, but I have no recollection of it.

(Paper dated October 26th, 1885, marked Exhibit A, Brown's cross-examination.)

Q. Now, Mr. Brown, who said anything at the time the 27 bonds were delivered to you about the retention of any bonds?

A. Mr. Short.

Q. Anybody else?

A. I think not.

Q. What did Mr. Short say?

A. I asked for the balance of my bonds. I asked for the 30 bonds remaining and he claimed that——

486 Q. Now, tell us what was said.

A. He said that they retained 10 % of the issue of the bonds, the $25,000 under the contract. I objected to it.

Q. Is that all he said?

A. No.

Q. I ask for the conversation. Tell what Mr. Short said.

A. Well, he said that came under the extension, and that they had a right under the contract to 10 % of the bonds for any extension. I objected to his construing the contract that way; told him there was nothing in the contract could give him any right to any commissions; that this was not the extension referred to in the contract, as this extension was done with my money and not any money he had raised from the bonds, or that there was any sale of the bonds. He said that was his construction of the contract and he should retain a commission of 10 %, and retained three bonds.

Q. Please wait. We want all the conversation first.

A. He said he would retain three bonds; he could not very well split one and give me a receipt for a half a bond; when they should be sold I would be entitled to a half a bond from them. So I accepted that, getting what I could from them. I had hard work to get my money out of them.

Q. Now, have you stated all that was said?

A. So far as I can recollect now.

Q. Did Mr. White say anything?

A. I don't remember that Mr. White was present at that time; I don't recollect. I know that he said——

Q. You were mistaken when you said that he was present?

A. Oh, he was present that day when I went into the office; he was there that day and the next day. I don't remember whether he was in the office with Mr. Short and myself all the time or a part of the time. I don't recollect it particularly.

487 Q. Did you have any conversation with Mr. White about those bonds?

A. I don't recall any now.

Q. Now, didn't Mr. White hand you those bonds?

A. I don't think he did. I done my business with Mr. Short.

Q. Will you swear Mr. White did not hand you those bonds?

A. No; I would not swear he did not hand them to me, but it occurs to me Mr. Short may have sent him out after the bonds to the safety vault somewhere where they had kept them locked up.

Q. You have something of that sort in your memory?

A. I have an idea he sent him out for them.

Q. When Mr. White returned did he not hand those bonds to you?

A. I don't think he did.

Q. Will you swear he did not?

A. No; nor I won't swear that he did.

Q. After he had handed those bonds to you did you not hand the three bonds to Mr. Short?

A. The bonds were laid on the desk. My remembrance is the bonds were laid on the desk before which Mr. Short and I sat and this conversation which I have repeated occurred and I think he gave me a receipt for the half a bond.

Q. By whom were the bonds laid on the desk?

A. I think by Mr. White.

Q. Did Mr. Short take hold of them before the receipt was written or touch them?

A. Oh, I could not say as to that. They were laid on the desk or table where we were sitting and passed over to me.

Q. Who passed them over to you?

A. Mr. Short.

Q. Did Mr. Short take them in his hand and pass them over to you?

A. Yes, sir.

Q. Didn't you take them in your hands and deliver them over to Mr. Short?

A. No; the bonds were delivered to Mr. Short.

488 Q. Will you swear you did not hand those bonds to Mr. Short?

A. Why, you are asking me to swear to the particular wording of everything, and which occurred four or five years ago. Now, I can give you the general result and what occurred, but I won't swear to the exact wording.

Q. You are unwilling to swear you did not hand those bonds to Mr. White?

A. The bonds were brought in there, and now it occurs to me that Mr. Watson was the only man that had the keys to the vault—he was the secretary and treasurer—and that Mr. Short may have sent him for the bonds, but they were handed by the party that brought them in—were laid on the table or the desk that Mr. Short was working at, and then the business was done and the conversation occurred there.

Q. You can't tell whether you handed the bonds to Mr. Short and he handed them to you in the first instance?

A. What first instance do you refer to?

Q. Well, before anything else was done, after they were brought in, in respect to them.

A. Why, the bonds were brought in and Mr. Short handed them to me. I took them and went to the bank with them.

Q. You are confident of that? You think you did not take them and hand them to him?

A. I can't see why I should hand them to him.

Q. I don't ask why. I am asking you as to the fact. I don't ask you to reason about it.

A. He had been the custodian or the assumed custodian of everything there was in New York that belonged to the Toledo, Columbus & Southern.

Q. Now, will you swear you did not say to Mr. Short that they were entitled to a commission of 2½ bonds?

A. Oh, yes; I will swear that I did not say it.

489 Q. And that inasmuch as you could not give them 2½ that he could keep 3 and give you a receipt for a half a bond?

A. I objected very strenuously to his retaining the bonds.

Q. Wait; will you swear you did not do that?

A. Yes, sir.

Q. Now, you have mentioned Mr. Watson as being the person bringing in the bonds?

A. I say he may have been the person.

Q. Where did Mr. White sit at that time?

A. I don't remember that he sat at all.

Q. Was the conversation between you and Mr. Short animated?

A. Somewhat so.

Q. Were you angry?

A. No; I never get angry.

Q. Was he angry?

A. No.

Q. Perfectly peaceable and quiet, was he not?

A. Well, I asserted my rights that I was entitled to; that they had no right to retain any part of the bonds, and because I could not get the thirty I took the 27; was glad to get them out of his hands.

Q. You were anxious to get all you were entitled to?

A. I was anxious to get all I could and what I was entitled to.

Q. You demanded all you thought you were entitled to?

A. I demanded what I knew I was entitled to.

Q. What did you do with those 27 bonds?

A. I took them over to the Central Trust Company.

Q What did you do with them there?

A. I deposited them there.

Q. Take a receipt for them?

A. I don't remember; I think I did.

Q. What did you with that receipt?

A. I don't know; I have not thought of the transaction since hardly; I don't know whether I took a receipt or not; if I did I have got it somewhere.

490 Q. Did you not deliver that receipt to Judge Burke?

A. I may have done so.

Q. Don't you remember doing so?

A. I don't, particularly.

Q. When did you first have any conversation with Judge Burke that you can now recall about the Toledo, Columbus & Southern Railway Company?

A. Well, that I could not say; Judge Burke and I have been ac-

quainted some time, and we had talked about the Toledo, Columbus & Southern Railway Company a good many times.

Q. Did you have any talk with him in December, 1885, about it?

A. Yes, sir.

Q. Did you execute a contract with Judge Burke, with the Hocking valley, in December, 1885?

A. I executed a contract with an option with the Hocking Valley Company in 1885, I think.

Q. What do you mean by an option?

A. Well, it was a contract with an option.

Q. Have you got a copy of the contract you made with Judge Burke?

A. I presume so; I don't remember.

Q. Do you remember anything about the language of it?

A. I don't recall it now; I know the general meaning of it.

Q. Do you remember where it was made?

A. Yes, sir; it was made in Cleveland.

Q. (Witness handed paper and asked to read same.) When that contract was signed did you deliver the receipt of the Central Trust Company for the 27 bonds to Judge Burke?

A. I did not.

Q. What did you do with those bonds or with the receipt? By the way, assuming now the truth to be, as Judge Burke has stated, that the receipt of the Central Trust Company was dated some time after the 10th of December, 1885, do you still say that immediately upon receiving those bonds you delivered them to the Cen-
491 tral Trust Company?

A. Yes, sir; within a day or so.

Q. Do you still say you immediately procured the receipt of the Central Trust Company for them?

A. I think that I did. I should not be very apt to deliver any property without a receipt.

Q. Then did you afterwards surrender that receipt and take a new one?

A. I don't remember.

Q. Did you receive any money from the Hocking Valley at the time of the execution of this contract?

A. Yes, sir.

Q. You said you wanted the bonds to obtain money to pay the interest on the notes?

A. Yes, sir.

Q. Held by Mason & Jillson? How did you utilize bonds to obtain money?

A. I deposited them with the Central Trust Company and had an order from Judge Burke for the money to pay interest on the notes.

Q. An order upon the Central Trust Company?

A. Yes, sir.

Q. And with that you obtained the money with which the notes were paid?

A. The interest was paid.

Q. The remaining $15,000 you received personally?
A. Yes, sir.
Q. Have you ever paid either the $15,000 or the $9,500?
A. No.
Q. Now, when did you first begin to talk with Judge Burke about this contract?
A. I don't remember; perhaps two or three weeks before the execution of it.
Q. Had you had any conversation with any person connected with the Toledo, Columbus & Southern Railway Company about any such negotiation?
A. I did not.
Q. Your negotiations with Judge Burke had begun before you went to the office of the Finance Company and received the
492 27 bonds?
A. Yes, sir; it was completed.
Q. How?
A. The negotiations were completed, I think.
Q. Had this paper been signed before you got those bonds?
A. I think so.
Q. Did you tell Mr. White or Mr. Short that you had made any such contract with the Hocking Valley?
A. I did not. It was not necessary.
Q. Did you tell Mason & Jillson or either of them?
A. No.
Q. You said it was not necessary to do so?
A. It was not.
Q. Were they not interested in the Toledo, Columbus & Southern Railway Company?
A. Only as creditors; that is all. I owned the stock and the bonds.
Q. That was your view of it?
A. My view of it.
Q. How much stock and bonds did you own?
A. I owned, I think, $438,000 of stock.
Q. Well, how many bonds?
A. And I owned all the bonds but 65 that was given as a bonus.
Q. Who owned the rest of the stock?
A. Mason & Jillson under the contract had $360,000, I think. The contract will show exactly.
Q. Then if they owned that stock why were they not interested in what was done in respect to the Toledo, Columbus & Southern railroad?
A. Because they was not interested in my stock.
Q. You undertook to make a contract by which you should pass the control of the Toledo, Columbus & Southern Railway Co over to the Hocking Valley Railway Company. You did that without consulting anybody else?
A. I owned the control of the stock.
Q. You did that without consulting anybody else in any
493 way interested with the Toledo, Columbus & Southern Railway Company?

A. Yes, sir.

Q. Had you served upon anybody connected with the American Finance Company or upon Mason & Jillson any notice of the termination of any contract with them prior to the execution of this contract with Judge Burke?

A. I don't remember the date, but I had served a notice on the American Finance Company.

Q. Did you serve any notice on them prior to the 4th of January, 1886?

A. I don't remember the date. I have a copy of the letter at home in which I notified them of the option in the contract and the contract for extension had expired.

Q. Had you at any time prior to the 10th day of December, 1885, notified any person connected with the American Finance Company that you regarded the contract as at an end?

A. I don't remember the date, but I think not at that date. I don't remember the date. I have a copy of the notice.

Q. Now, how came you in this contract to recite that you were the owner of $430,000 only of the stock of that company, "whereas said Brown is the owner of about $430,000 par value of said stock"?

A. That contract was drawn by not stating just the exact amount of the stock, but whatever stock was mine the tripartite agreement shows.

Q. How came you to say you were the owner of about $430,000? Observe, you don't say exactly; you say "about." How came you to fix upon that sum?

A. Because I knew that I had that in my own name—should have had it in my own name.

Q. Who had the rest?

A. That I can't tell.

Q. Who was entitled to the rest?

A. Mason & Jillson were entitled to whatever was provided for in the tripartite agreement.

494 Q. And the finance company were entitled to whatever was provided in the tripartite agreement?

A. Yes, sir; I think their amount was $32,000.

Q. And they had an interest beyond any question to the extent of $32,000 of the stock, had they not?

A. Yes, sir.

Q. How came you to recite in this contract that you were the owner of about $650,000 of the bonds of said company?

A. Well, I suppose because that was the fact.

Q. Now, you proposed by this contract to turn the railroad of the Toledo, Columbus & Southern Railway Company over to the control of the Hocking Valley Railway Company. That was your intention, was it not?

A. Well, they would have had control of the stock when it had been organized.

Q. But this contract provides for turning the property over to their control?

A. Yes, sir; whatever the contract provided would have been done.

Q. You did that without having consulted anybody else interested in the property in any way?

A. It was not necessary.

Q. I don't ask that.

(Question repeated.)

A. I did.

Q. Now, this contract provides for the delivery of $400,000 issue of $600,000 of stock of the company reorganized, of which the Hocking Valley were to have $400,000 and — were to have $200,000. How did you propose to secure the reorganization of the Toledo, Columbus & Southern Railway Company?

A. Why, by making an arrangement with all that were interested.

Q. What arrangement did you propose to make?

A. Well, we hadn't got to that yet. I was then figuring to raise money to get out of the clutches of the fellows in New York that was robbing it all from me and still robbing from me, so I had to raise money to pay the interest.

Q. When did you come to the conclusion they were trying
495 to rob it all away from you?

A. Oh, I knew it along about October; earlier than that, probably.

Q. What brought it to your knowledge?

A. The arrangement they made to send down and get the right of way without my knowlegge.

Q. What arrangement had they sent down to get the right of way?

A. They made a contract with some parties to give the right of way.

Q. Where?

A. South from Findlay, without my knowledge.

A. For the purpose of exteading the road?

A. Yes, sir; that was the intention.

Q. The tripartite contract provided for an extension of the road, didn't it?

A. Yes, sir.

Q. And you were desirous of having the road extended, were you not?

A. Yes, sir.

Q. That was the very foundation of the scheme, was it not, which was embodied in the contracts of April 14th and September 24th, 1884?

A. The foundation of the scheme with me was to raise money to take care of the road.

Q. The essential part of the scheme was the continuation of the road?

A. That was the full intention.

Q. Now, when did you make up your mind you did not want that road extended?

A. I never made up my mind I didn't want it extended it all; never made up my mind that way.

Q. When did you make up your mind not to have it extended?

A. I was forced to the conclusion that it would not be extended along about October, I think—I am not certain—when the parties——

Q. What forced you to the conclusion that it would not be extended?

A. As I told you before, that the parties could not raise any money in New York, and at about the same time had let
496 the contract to some parties to secure the right of way part way.

Q. Letting the contract to parties for the procuring of the right of way led you to think that the road would not be extended, did it?

A. It was let unbeknown to me. I was kept out of it entirely.

Q. Did you make up your mind because they had made a contract without your knowledge therefore that the road should not be extended?

A. No. I made up my mind that whatever they were doing they were doing to rob me.

Q. What had happened to lead you to think they had made up their minds to beat you?

A. A great many things had happened. One was that I had a contract that money enough should be held out of the $325,000 to pay my interest due September 24th; they wrote me the last week before it was due that they had had the money and spent it.

Q. Was there any contract by which it was provided that money should be reserved out of the $325,000 coming from Mason & Jillson to pay interest on the notes?

A. No; there was not.

Q. When was the contract you speak of made? You said you had a contract that they should reserve enough money out of the money coming——

A. I desire to correct that. I did not have a contract. I had given them orders by letter. I had written them that the first year's interest I wanted to pay out of the money which I received because — wanted to use all the gross receipts of the road in rebuilding the road. I calculated on that money to meet the interest.

Q. Then what do you say the finance people had done which led you to think they were trying to beat you?

A. First——

Q. Prior to the 10th of December, 1885?

A. First, they had spent all of the money, so that I could
497 have none to meet my September interest on the loan, and, next, they made an arrangement with outside parties to procure a right of way without my knowledge, and had made them a great many promises what they would do; they had promised one man he would be general manager of the road at the next annual election.

Q. How do you know that?

A. I got it by a letter that a party wrote to the general manager of the L., B. & W. road, asking for transportation, saying he would be in a position another spring to return the compliment.

Q. Did you say anything to the finance company people about that?

A. No.

Q. Never did?

A. No; not at that time.

Q. Now, you say they had used the money. Mr. Brown, is it not true that you paid considerable more for the claim of the Chicago Steel Company than you expected to pay when the arrangement for raising the $325,000 was made?

A. Yes, sir; we paid more than we expected to.

Q. How much more than you expected to?

A. Well, I think some ten or fifteen thousand dollars.

Q. Was it not more than that?

A. I think not. In addition to that when we made out — estimate of what we could purchase that claim at we did not take into account $10,000 of receiver's certificates which they held and interest on them and attorneys' fees which we had to meet.

Q. So the reason was you paid considerable more than you expected?

A. Yes, sir; ten or fifteen thousand dollars.

Q. Now, was not that the reason that the money was all used up?

A. No.

Q. And that there was not so much of a surplus as you expected?

498 A. No; because I wrote Mr. Short that I wanted to have them to be sure to retain money enough to meet the September interest.

Q. When did you write that?

A. Along in the summer; I don't remember the date.

Q. Have you looked at the correspondence in this printed book?

A. Not for a long while.

Q. Do you know whether there is any such letter in this book?

A. I don't know whether there is or not.

Q. You don't know that there is?

A. No; I don't know that there is or that there is not.

Q. Well, now, have you stated all the reasons why you think they were trying to beat you?

A. Well, all that I recall just now.

Q. Well, did you make up your mind then that inasmuch as they were trying to beat you you would turn around and beat them?

A. No, sir; I didn't want to beat them. I simply wanted what was due me under the contract.

Q. Why didn't you go to them and ask for an explanation from them?

A. By the way, I do remember another reason that comes to me now, and that is that we held a board of directors' meeting in Toledo, something to be done or ratified by the board, and they sent on a power of attorney for me to vote my own stock; that was the

first I knew that they had transferred it to themselves as trustees instead of leaving it in my name and leave it in their hands as trustees and I retain the voting power.

Q. Why didn't you go to them and ask them for an explanation?

A. From that time I voted the stock as trustee, because *as* I wrote them then, after the meeting, protesting against their holding my stock in their name as trustees, and then commenced
499 the correspondence of my complaints to them. I had voted it as trustee, or rather as proxy, because I wanted the same thing carried that they did, some resolution or something in the board; I don't remember exactly, but nothing of great importance; something we all agreed upon.

Q. When you came to the conclusion they were trying to beat you why didn't you say something to them on that subject?

A. Why, I did in this protest.

Q. When was that protest sent?

A. Immediately after the board meeting.

Q. When was the board meeting?

A. Along in the fall.

Q. What time in the fall?

A. I don't remember exactly, but I think September or October.

Q. Before you had given an order for the delivery of the 30 bonds to the finance company?

A. Yes, sir; I think it was.

Q. When you gave the order for the delivery of 30 bonds to the finance company did you think they were trying to beat you?

A. I don't remember the dates exactly, but I was convinced for some weeks that they were endeavoring to get control of the company and to issue stock enough while they had control to overcome my share of stock and try and get at it legally in that way under some contract, and then, of course, they would be beat by my coming in——

Q. Can you tell anything that happened to indicate any such purpose?

A. Yes, sir; the general actions of all.

Q. Specify.

A. Well, I can't specify anything directly except this sending on my stock and sending on a proxy for me to vote my own stock.

Q. You thought the sending of a proxy to you to vote your own stock was an indication on their part of a desire to get the stock?

500 A. Yes, sir; the by-laws provided that none but stockholders of record should vote, and they had made themselves as trustees stockholders of record.

Q. When did you first learn how that stock was?

A. At the time they sent on this proxy.

Q. Never had known of it before?

A. No, sir.

Q. Had you made no inquiry?

A. No; because I supposed it was in my name.

Q. You made no inquiry?

A. No.

Q. When you made the Hocking Valley contract what did you propose to do in regard to the 65 bonds mentioned in the tripartite contract as a bonus?

A. Well, I hadn't got as far as that; I was simply looking for parties who would protect me from being robbed by the American Finance Company and Mason & Jillson.

Q. Did you go to Judge Burke and ask him to make an arrangement with you to protect you from being robbed by the American Finance Company?

A. Yes, sir; I came to Judge Burke as a friend to take hold and help me.

Q. When was that?

A. That was along in the last of 1885; somewhere along there.

Q. You made your arrangement with him without any plan as to what should be done about the 65 bonds?

A. Yes, sir.

Q. What was proposed to do about the 80 bonds held by the finance company?

A. I don't know that they held any.

Q. What did you suppose had become of those eighty bonds?

A. I suppose the finance company had hived them.

Q. What made you suppose the finance company had hived them?

A. A good many reasons. I found out their schemes by which they were trying to get hold of my interest in the road.

Q. Specify.

A. I have specified one; when they sent a proxy for me to vote my own stock at a stockholders' meeting.

501 Q. Was that the first intimation you had — anything had been done in respect to the 80 bonds?

A. Well, I can't tell exactly the first intimation; but I think it was.

Q. You knew the provisions of the tripartite agreement?

A. Yes, sir.

Q. You testified you were very familiar with it?

A. Yes, sir.

Q. When did you become familiar with the provisions of the tripartite agreement and the agreement of April 14th?

A. The day they were made.

Q. You understood that perfectly at that time?

A. Yes, sir.

Q. Now, you knew that by the tripartite agreement 80 bonds were to be delivered to the finance company, didn't you, for their commissions?

A. I did not understand any such thing.

Q. You have testified that five bonds that were delivered to you were delivered because you were entitled to them by the tripartite agreement?

A. Yes, sir.

Q. Do you remember what provision of the tripartite agreement entitles you to these 5 bonds?

A. Yes, sir.

Q. Will you kindly take this volume and turn to it? It commences at page 302. Point out the provisions of the tripartite agreement which entitles you to the 5 bonds.

A. Yes, sir; under section 9.

Q. I will read the section: "All the remaining of said $800,000 first-mortgage bonds of said Toledo & Indianapolis Railway Company over and above the $650,000 of same pledged to secure the payment of said $325,000 of said notes are hereby appropriated as follows: (1) to the purchasers of said notes their said bonus
502 amounting to $65,000 thereof, to be distributed among them *pro rata* according to their respective holdings of said notes; (2) to said American Finance Company $80,000 thereof in full payment of all claims for commission for negotiating said $800,000 of said bonds; (3) to said Brown $5,000 thereof." * * * Now, you understood that when you signed it, you have said?

A. Yes, sir.

Q. You knew, then, that $65,000 of those bonds were to be delivered to Mason & Jillson or through them to parties who took the notes?

A. Yes, sir.

Q. As a bonus?

A. Yes, sir.

Q. You knew that $5,000 were appropriated to you?

A. Yes, sir.

Q. To be delivered as notes are disposed of?

A. Yes, sir.

Q. You knew that $80,000 thereof were appropriated to the finance company to be delivered in the same way?

A. I knew that provision was there, but it was not the intention to give them 80 bonds until they had sold the bonds.

Mr. Blair: I ask that answer to be stricken out.

The Master: The motion is overruled.

Q. You knew that the $650,000 of bonds had been delivered to somebody during the summer of 1885, did you not?

A. Yes, sir.

Q. To whom did you know or understand the $650,000 of bonds had been delivered?

A. To Mason & Jillson.

Q. You knew the $65,000 of bonus bonds were delivered?

A. Yes, sir.

Q. To whom did you understand they were delivered?

A. Mason & Jillson.

Q. What had you supposed had been done with the 80 bonds?

A. I supposed they were retained.

503 Q. Did you ever ask anybody anything about it?

A. I don't remember, but I supposed they were retained.

Q. Do you remember having any conversation with anybody about it?

A. I don't think I did; I don't remember.

Q. Do you mean to say you did not know prior to the 10th of December, 1885, that the 80 bonds had been delivered to the American Finance Company by the officers of the railway company and receipted for by the finance company?

A. I did not know that that was done, sir.

Q. You had no knowledge on that subject whatever?

A. Not at that time.

Q. You had heard nothing about it?

A. No; I had presumed it was so from what had been done by them previous to that.

Q. What had been done by them previous to that which led you to presume that it was so?

A. Well, as I said, when they undertook to steal my stock.

Q. That is to say, when you found that the stock had been issued in their name as trustees?

A. They had issued it to themselves as trustees or caused it to be issued.

Q. Who issued the stock?

A. The president and secretary.

Q. Of what company?

A. The Toledo, Columbus & Southern.

Q. To whom was it issued?

A. It was issued to the American Finance Company, trustees.

Q. Then they had issued it to themselves, had they?

A. They were the finance company and president of the railroad company, and Mr. Short, president of the finance company, were the finance company.

Q. You knew that all the time, didn't you?

A. Yes, sir.

Q. And knew that when the transaction was begun?

A. Yes, sir; Mr. White's son was secretary.

504 Q. You voted Mr. White president of the company?

A. I voted for him because I was obliged to.

Q. How were you obliged to?

A. Because they had $140,000 of my money which laid in their hands and went to work and cheated me straight in the presidency of the road and I had to sit there and take it.

Q. That was the state of things when you made the contract with Judge Burke?

A. When I made the contract with Judge Burke my intention was simply to take care of myself, my own property and not theirs.

Q. What did you propose when you made the contract with Judge Burke in regard to the 80 bonds claimed by the finance company?

A. I told you some time ago I hadn't got as far as that. I made a contract, got money to provide for the payment of interest——

Q. You made a contract by which you agreed to deliver the railroad company to a new company, didn't you?

A. The contract will show for itself.

Q. Now, what did you propose to do to get the consent of any of the other parties interested in the old company to the transfer?

A. I first proposed to get my own, then I could take care of the rest after that.

Q. Was there any talk between you and Judge Burke as to what should be done in respect to the $65,000 of bonus bonds?

A. There may have been, but I don't remember.

Q. Have you no memory on that subject?

A. No.

Q. Not a word said?

A. No.

Q. Was it discussed between you whether those bonds should be repudiated or recovered?

A. I remember Judge Burke, in discussion with my attor-
505 ney, Judge Doyle, said that it was illegal; that the transaction was illegal.

Q. Did that suggestion come from Judge Burke in the first instance?

A. In the discussion with my attorney.

Q. Then you proposed, did you, to repudiate the $65,000 of bonus bonds?

A. We didn't make any proposition at all.

Q. Nothing was said about it?

A. No; we simply agreed to get my money that I could take care of my interest.

Q. How did you propose to take care of the interest?

A. With the money furnished me.

Q. What were you going to do?

A. Pay it.

Q. To whom?

A. To the party that held the notes.

Q. Did you expect to get the $650,000 of bonds?

A. Whenever I paid the notes.

Q. You expected to get then too?

A. Yes, sir.

Q. Did you expect to get back the $65,000 of bonus bonds?

A. We hadn't got far in our expectations.

Q. Nothing was said about that?

A. No.

Q. How did you expect to get possession of the 80 bonds held by the finance company?

A. Well, they are my bonds.

Q. How did you expect to get possession of them?

A. The same way I would of my stock which they held.

Q. That is not an answer to my question. How did you expect to get possession of the 80 bonds held by the finance company?

A. I had not laid out any particular course how it would be done, but it would have to be done at the same time I got my stock from them.

Q. Was anything said on that subject?

A. I don't remember.

Q. How did you expect to get the $32,000 of stock which you have admitted they were entitled to?

A. We had not got as far as that.

506 Q. You said nothing about it?

A. Said nothing about it.

Q. You made this scheme with Judge Burke with the expectation of taking some steps by which you would squeeze out of Jillson the 65 bonus bonds, the finance company holding 80 bonds and all the stock, except what you held, or tie it up. Is not that so?

A. I don't know whether it was a squeezing operation or not, or what it was. I simply intended to turn the tables on them. Instead of them robbing me and taking every dollar I had I proposed to get back what was my own.

Q. And rob them?

A. No, sir; simply to get back what they had of mine and pay them their money in full.

Q. You entered into that scheme without having one word with either Mason & Jillson or the finance company or anybody representing the finance company in respect to what you proposed to do?

A. It was nothing that concerned them.

Q. Now, the suit that was brought in the February following was a part of the plan or in pursuance of the plan that was advised when this Hocking Valley contract was made?

A. I don't know whether it was this plan or not. Of course the intention was if they would not give me back my stock I would commence suit for it.

Q. Did you before suit was begun ask them to give you back anything?

A. Oh, yes.

Q. When?

A. At the time I paid my interest.

Q. What did you ask them to give you back?

A. I asked Mr. Mason to give me back my stock and bonds.

Q. What bonds?

A. The 65.

Q. The 65 of what?

A. The 65 bonds which he held, and to give back my stock. The first demand, I think, was for my stock. My attorney was present with me and made the demand.

507 Q. Did you specify any stock?

A. Yes, sir.

Q. What stock did you specify?

A. The stock that belonged to me, which he had connived with the officers of the finance company to issue to the American Finance Company as trustees instead of issuing it to me.

Q. Do you mean the $430,000 of stock mentioned in the contract with the Hocking Valley?

A. Yes, sir.

Q. You did not claim the remaining $370,000 of stock, did you?

A. Yes, sir; I claimed it all.
Q. And you demanded it all?
A. I demanded it all.
Q. Of Mr. Mason?
A. Yes, sir; of Mr. Mason.
Q. Where?
A. At New York.
Q. At what place in New York.
A. Well, I think it was in the bank where we paid the interest to him.
Q. Do you remember what date in December that was done?
A. No; I do not.
Q. Who was with you? You said your counsel; that was whom?
A. Judge Doyle, of Toledo.
Q. He heard that?
A. Yes, sir.
Q. Who made the demand?
A. My attorney.
Q. On what ground was it put?
A. On the ground that they had not lived up to their contract with me in any shape or manner; that they had not paid their money in as they agreed to, and held back the improvement of the road for almost a year, and other things connected with it. I cannot specify everything.
Q. Did you say anything about the contract having been usurious at that time? What are you looking at?
A. I was looking at a note I had.
Q. Will you be kind enough to lay it aside?
A. In a half minute I will. You asked a question. I wanted to see if I could discover a date—the date I paid that interest;
508 it ain't dated on the note. I have one of the notes. I thought to give the date, you know, that I paid that first interest, or rather the second interest, which was due September 24th.
Q. Did you say anything about the contract being usurious at that time?
A. What time was mentioned?
Q. The time when you say you had this talk with Mr. Mason.
A. Yes, sir. I believe Judge Doyle went over the matter with him.
Q. Was that before any notice had been served upon the finance company?
A. I don't remember, not having the exact date that the notice was served.
Q. Did you make any demand upon the finance company for anything before the suit commenced in February was begun?
A. I don't remember.
Q. You have no recollection on that subject?
A. On adjourning from the bank Mr. Mason, Judge Doyle, and myself, after conversation there, went over to the finance company and talked with Mr. Short; he said he would do whatever Mr. Short said about the stock, and went over there after they had had

a private consultation and told Judge Doyle that they would not consent to have the stock put into my name because Mr. Short considered the contract didn't intend it that way.

Q. Was that all that was said there?

A. All I recall now.

Q. The demand, as I understand, for the return of the stock and the bonds was made at the office of the bank where the interest was paid?

A. Yes, sir; that was the first demand; then we adjourned to go over to the American Finance Company's office and Mason went to consult with Short, and after consultation with him he told Judge Doyle and myself that Mr. Short would not consent to have the stock transferred under the contract.

509 Q. Was that all that was said?

A. Well, then he made a demand again; told him he demanded the whole of the security.

Q. Made a demand upon whom?

A. Upon Mr. Mason.

Q. Who else was present?

A. I don't remember that any one was present at that time.

Q. Was that in the office of the finance company?

A. It was in one of their offices. They had five rooms at the time.

Q. Did you at that time make any demand upon the finance company?

Q. I don't remember.

Q. Did you say anything to the finance company about your relations with them?

A. I don't remember.

Q. That was how soon after you got your 27 bonds?

A. It was in a couple of days, I should think.

Q. Did you at that time demand a return of the three bonds that had been retained by the finance company?

A. My attorney did.

Q. At that time?

A. Yes, sir. He had a talk with Mr. Short.

Q. Were you present?

A. No.

Q. Very well; you don't know that?

A. He went into the room on purpose for that.

Q. I don't want you to testify what Judge Doyle did if you were not present. I ask you whether you made any demand.

A. I didn't make none personally.

Q. You don't know, except by hearsay, whether any one was made or not?

A. I know Judge Doyle made it because he said he did. He went into the room on purpose for it.

Q. Now, did he demand anything else than three bonds?

A. Yes, sir; he demanded some $2,000 of my money that they have got yet where they made charges two or three times over.

510 Q. Did he demand anything else?

A. I don't remember.

Q. Did you say anything to the finance company people about your contract with the Hocking Valley Company?

A. No.

Q. Did Judge Doyle for you?

A. I don't know that he did.

Q. Did you say anything to Mason & Jillson about it?

A. No; not that I know of.

Q. Not a word?

A. I don't remember that I did.

Q. Did you say anything to the finance company people about the transaction having been void for usury?

A. I don't remember whether I did or not.

Q. Do you know whether Judge Doyle did?

A. I do not.

Q. Now, the finance company people in their answer or in the testimony in the suit brought by you in New York charge that you had made a secret contract with the Hocking Valley Company, don't they?

A. I don't remember.

Q. Do you remember what you said in your answer to that?

A. I don't recall now.

Q. In your affidavit?

A. I don't recall what I said.

Q. You had made a contract with the Hocking Valley Company for a virtual transfer to that company of the Toledo, Columbus & Southern Railway Company secretly and without the knowledge of the American Finance Company, did you not?

A. I did.

Q. Do you know when it came to their knowledge you had made such a contract?

A. I don't know anything about it.

Q. You did not inform them——

A. I don't remember.

Q. Of the fact of having made that contract with the Hocking Valley Company?

A. I am inclined to think, though, in reply to that question, that Judge Burke notified them by letter immediately after he furnished me the money for the payment of this second installment of interest; I think he notified them by letter.

511 Q. You don't know anything about that?

A. I saw the letter, I think.

Q. After having made that contract with the Hocking Valley Company did you assign any interest in the bonds or stock of the Toledo, Columbus & Southern Railway Company to anybody else?

A. You mean at that time?

Q. After having made the contract with the Hocking Valley Company, which is in evidence, did you assign any interest in the stock or bonds of the Toledo, Columbus & Southern Railway Company to anybody else?

A. Some time after that I sold my entire interest to Judge Burke or Mr. Hickox.

Q. By your entire interest what do you mean?

A. All that I had in the company, in the road.

Q. Can you be any more specific than that?

A. That answers your question.

Q. No; it don't.

A. Will you please repeat the question?

Q. Did you make a written assignment?

A. I made a written contract with them.

Q. When?

A. I think a year after the first one; I don't remember the date, but I think it was about a year.

Q. Did you at any time assign any stock or bonds of the Toledo, Columbus & Southern Railway Company to Judge Burke?

A. No.

Q. Are you sure of that?

A. I had no stock; the finance company had hived it or issued it in their own names.

Q. You recited in the contract with the Hocking Valley Company you were the owner of $430,000?

A. Yes, sir; I was the owner.

Q. You were the owner of 650 bonds?

A. Yes, sir; that was so.

512 Q. Did you at any time after the making of the Hocking Valley contract assign $430,000 or any number of shares, any number of dollars of stock, in the Toledo, Columbus & Southern Railway Company to Judge Burke personally?

A. I answered the question before that about a year after the Hocking Valley contract I sold my entire interest to Judge Burke and Mr. Hickox—bonds and everything—all my interest in the stock and bonds.

Q. Between that transaction and the contract with the Hocking Valley Company did you make any assignment?

A. No.

Q. Are you sure of that?

A. I don't remember that I did.

Q. Are you confident about it?

A. Well, I am not confident; I don't remember. You mean to the same parties?

Q. To Judge Burke.

A. If I did it was in carrying out or attempting to carrying out the first contract; I don't remember.

Q. With the Hocking Valley Company?

A. Yes, sir; I don't remember.

Q. And in the interest of the Hocking Valley Company, was it?

A. I don't remember anything about it.

Q. You say it was for the purpose of carrying out the contract?

A. I say if I did it was for that purpose, but I don't remember making any assignment.

Q. Was any assignment made by you between the Hocking Val-

ley contract and the assignment made in December, 1886, of any stock or bonds of the Toledo, Columbus & Southern Railway Company to Judge Burke for his personal interest and not for the interest of the Hocking Valley Company?

A. You mean between the Hocking Valley contract and the contract with Judge Burke and Charles Hickox?

Q. Yes, sir.

A. I don't remember.

Q. You have no recollection on that subject at all?

513 A. No; I don't remember. I would have to look over my papers.

Q. You said you knew Judge Burke served a notice?

A. Yes, sir.

Q. When did you learn he had served a notice?

A. Why, very soon after that he had written Mr. Mason and Mr. Jillson and, I think, the finance company.

Q. Very soon after what?

A. After, as I stated before—after the payment of the second installment of interest.

Q. When was that?

A. The last of 1885; I think it was in December, but I am not certain.

Q. Did he show you a notice?

A. No.

Q. Was it in the form of a letter?

A. I think it was.

Q. Did anybody else show it to you?

A. I don't remember.

Q. Did you ever see it?

A. I have seen it in the testimony.

Q. That is the only place you have seen it?

A. Yes, sir.

Q. Do you remember that that notice was dated April 1st, 1886?

A. I don't remember the date.

Q. Do you remember that in that letter Judge Burke claimed that he owned all the stock and bonds?

A. I don't remember.

Judge BURKE: The letter will show for itself.

Mr. BLAIR: I ask him what he remembers about it.

Q. I call your attention to the letter on page 519 of the record. Now, was it true at that time that you had sold all your interest in the 800 bonds of the Toledo, Columbus & Southern Railway Company to Judge Burke?

A. The letter shows for itself.

Q. That is not an answer to the question.

A. I don't remember the date of our second contract, or rather my contract with them personally.

514 Q. Whom do mean by them personally?

A. Judge Burke and Charles Hickox.

Q. That was in December, 1886?

A. I think it was.

Q. It so appears on the record?

A. Yes, sir.

Q. This letter is dated April 1st, 1886. I ask you whether it is true that on or about April 1st, 1886, you had sold or assigned your interest in the 800 bonds of the Toledo, Columbus & Southern Railway Company to Judge Burke.

A. I don't remember. I would have to look up my papers and contracts.

Q. Have you any recollection on that subject?

A. No; I have not.

Q. Was the contract between you and the Hocking Valley Company ever cancelled?

A. It was considered off, I think.

Q. What was said on that subject?

A. By whom?

Q. Anybody.

A. Well, they refused to carry out the contract.

Q. Please tell us what was said. That is not an answer.

A. I cannot repeat the words.

Q. Who said it?

A. Why, Mr. Shaw there, the president.

Q. When?

A. I don't remember the date.

Q. To whom did he say it?

A. Judge Doyle.

Q. Did he say it to you?

A. No.

Q. Then you have no knowledge except——

A. Judge Doyle was acting as my attorney.

Q. Did you ever have any conversation with anybody connected with the Hocking Valley Company about a re-cission of the contract?

A. Yes, sir; with Mr. Shaw.

Q. When?

A. I don't remember the date, but I should say within a few months after he became president of the Hocking Valley Company.

Q. When did he become president of the Hocking Valley
515 Company?

A. January 11th, 1887.

Q. If you had any talk with him about it it was after January 11th, 1887, was it?

A. Yes, sir.

Q. Did you before that have any conversation with anybody connected with the Hocking Valley Company about the re-cission of that contract?

A. No.

Q. Before you signed the contract with the Hocking Valley Company had the question whether the contract with the finance company could be gotten rid of or not been discussed between you and Judge Burke and Judge Doyle?

A. Yes, sir; that it would expire at the end of the year or had expired.

Q. What year?

A. At the end of the year.

Q. Was that all?

A. That was about all; about all I recollect now.

Q. Was anything said about any proceedings at law?

A. There may have been.

Q. Do you remember? Of course there may have been. Do you remember whether there was or not?

A. I don't remember now.

Q. You are not able to say there had been none?

A. No.

Q. You are not willing to swear that the subject had not been discussed fully?

A. No.

Q. Between you, Judge Burke, and Judge Doyle?

A. No.

Q. As to what steps should be taken to shake out Mason & Jillson and the finance company?

A. There was no talk at all about shaking them out. The whole talk was simply Judge Burke was standing behind me to help take care of my interest.

Q. That was so from the date of the making of the contract with the Hocking Valley Company?

A. That was the understanding or agreement.

Q. Now, $460,000 of the $500,000 that were to be issued by
516 the new company and guaranteed by the Hocking Valley Company were to be appropriated to you, were they not?

A. The contract shows for itself. I don't remember.

Q. They were either to be sold or exchanged, and either the bonds themselves or their proceeds were to be used in effecting a settlement with the holders of the notes—holders of the 650 bonds mentioned in that contract?

A. Yes, sir; I think that was the purport of the contract.

Q. And you proposed, I suppose, to pay the notes and take up the 650 bonds, did you?

A. We expected to pay my loan to Mason & Jillson, of course.

Q. And that would take $325,000 and perhaps something for interest?

A. Yes, sir.

Q. Now, what did you propose to do with the remaining $115,000 of bonds of the new company that was to be formed?

A. I don't remember the exact wording of the contract now, but that shows for itself what the provision was.

Q. "All the indebtedness of said Brown for which said bonds have been pledged shall be taken up and cancelled and said bonds retired and cancelled, and that all the stock of said company not at present owned by said Brown shall be taken up and turned over to the Columbus, Hocking Valley & Toledo Railway Company or its nominee." How did you propose to take up the stock not owned by Mr. Brown?

A. We hadn't got as far as that.

Q. Nothing said about that?

A. No; we hadn't got as far as what way we would do it. We didn't consider the stock worth anything.

Q. Your judgment upon that subject was probably correct, but they contemplated taking it up?

A. Yes, sir; we had to take it up in order to carry out the provisions of the contract.

517 Q. Now, was not the $115,000 of bonds which you were to get over and above the $325,000, more or less, or their proceeds, to be used in settling with these people who held the stock?

A. I think, if you will allow me, whatever there was above the $460,000 was to remain in the treasury.

Q. Yes; $40,000 was to remain in the treasury?

A. The contract provides for that.

Q. The $460,000 were to be delivered to you, were they not?

A. Yes, sir; after taking up my indebtedness to Mason & Jillson.

Q. Now, I will ask you whether it was not contemplated between you, Judge Burke, and Judge Doyle that the excess of $460,000 of bonds above what was necessary to pay the notes and take them up should be used, so far as might be needful, to get up whatever there was outstanding in the way of bonds and stock in the hands of any parties, the finance company included, if you could succeed in getting them upon terms satisfactory to yourselves?

A. The $325,000 belonged to me.

Q. Did you propose to make any provision whatever for the $65,000 of bonus bonds or the $80,000 of bonds held by the finance company?

A. No; because they did not own the $80,000.

Q. I don't ask you why.

A. And now it occurs to me that Mr. Mason told me——

Q. Hold on; I am not bound to accept your answer.

A. I will answer that question in that way. Mr. Mason told me three months before that if he could get his money back he would be glad to get out of the railroad business, therefore we had no right—it was not necessary to make any arrangement.

Q. (Question, "Did you propose to make any provision whatever," etc., repeated.)

A. I think I have answered that question before.

518 Q. How did you answer it?

A. I refer to the answer I have made.

Q. Answer it.

A. I decline to answer the question if I have to say yes or no. I can't answer it without an explanation. Will you please read the question?

Q. (Question repeated.)

A. We did not propose to make any arrangement for them, because we knew that they did not own them—the $80,000 of bonds—and that Mason had already said they would be glad to get their money

back—their money and interest—and give up everything they had, bonds, stock, and all.

Q. How do you know the finance company did not own their bonds?

A. The contract showed that.

Q. Will you point to any provision of the contract that shows that?

A. Yes, sir.

Q. Do so.

(Objected to.)

Q. Did you discuss with Judge Burke and Judge Doyle, at the time that contract was made, the question whether the finance company was entitled to its bonds?

(Objected to. Objection sustained. Exception by Mr. Blair.)

Q. Did you ever have in your possession any bonds of the Toledo, & Indianapolis Railway Company?

A. Yes, sir.

Q. When?

(To which question Judge Burke objected. The master sustained the objection; to which ruling Mr. Blair excepted.)

Mr. Blair: I offer to prove by Mr. Brown that at the time the contract of April 14th, Exhibit 1, and the tripartite contract of September 24th, Exhibit 2, in this record were made he was not the owner of a share of stock of the Toledo & Indianapolis Railway Company or of the bonds of the Toledo & Indianapolis Railway Company.

I offer to prove by him that the bonds of the Toledo &
519 Indianapolis Railway Company had all been pledged by that railway company as security upon the obligations assumed by the railway company, and that when those bonds were redeemed that railway company was entitled to the benefit of their redemption.

I offer to show that Mr. Brown had no interest whatever in either the stock or bonds of the railway company, except a possible interest upon an option given to him or some member of his family by Dowling, the contractor, who had contracted with the railway company to build its road from Toledo to Indianapolis in consideration of $800,000 of its bonds and a like amount of its stock; that Brown had put no money whatever into that road; that the contract which he made with Dowling was a contract made by him while president of the company, and a contract which never could have been enforced against either the railroad company or its creditors.

I propose to show, too, by Mr. Brown that the possible interest which he had under his option from Dowling *were* in jeopardy in proceedings to foreclose a mortgage made by the Toledo & Indianapolis Railway Company; that in order to save that possible interest it was necessary to raise $325,000 speedily, and that the con-

tracts of April 14th and September 24th, 1884, were made under these circumstances, and that the chief purpose of those contracts was to secure a loan with which to pay debts for which the bonds of the Toledo & Indianapolis Railway Company had been pledged, which could then be procured at a large discount, and also to pay liens existing upon the property, which could also then be obtained at a large discount.

The foregoing — offerred was overruled by the master, and to said ruling Mr. Blair thereupon excepted.

520 Q. When you made the contract with the Hocking Valley Company, through Judge Burke, did you intend that the finance company should thereafter sell any bonds of the Toledo, Columbus & Southern Railway Company?

(To which question Judge Burke objected; which objection was sustained by the master; to which ruling of the master Mr. Blair at the time excepted.)

Q. Did you ever ask the finance company to sell any bonds of the Toledo, Columbus & Southern Railway Company?

(To which question Judge Burke objected; which objection was overruled by the master; to which ruling Judge Burke at the time excepted.)

A. Yes, sir.
Q. When?

(Same objection, ruling, and exception.)

A. I cannot state the exact time, but all along for the last—well, all along during the summer of 1885.
Q. Whom did you ask?
A. Mr. Short.
Q. Where?
A. By letter.
Q. More than once?
A. Yes; a number of times.
Q. Have you any copy of any such letter?
A. I think I have.
Q. Will you furnish it to the master to be appended to this record?
A. I will if I can find it.
Q. Did you ask anybody else?
A. I don't remember that I did.
Q. Do you remember the substance of any letter on that subject?
A. Well, I don't remember the exact substance, but the probability is that I wrote to inquire the prospects of their making the sales and so on, and how long before they would send me some money.
Q. That is the substance of the letter as you remember?
A. Yes, sir; not only that, but the general talk; it was talked whenever we met, you know.
Q. That was the substance of the talk?

A. Yes, sir.

521 Q. And that was all?

A. I don't remember. I don't recall anything more, but we had a general talk and correspondence at the same time.

Judge Burke offers in evidence bill in equity in the case of M. R. Crow *vs.* The Toledo, Columbus & Southern Railway Company and others, filed in the circuit court of the United States, Toledo division.

It is stipulated that the disposition of this case shall remain before the present master commissioner until finally disposed of by him, notwithstanding he may in the meantime qualify as judge, and that the case be adjourned until Wednesday, September 18th, 1889, at 2 o'clock p. m.

522 Afterwards, to wit, on the 4th day of April, A. D. 1890, there was filed in the clerk's office of said court the following exceptions, to wit:

Exceptions to the Report of Special Master A. J. Ricks.

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and Others.

Now comes Stevenson Burke and Charles Hickox and except to the report of the special master, A. J. Ricks, recently filed in this court touching the ownership of sundry bonds, and the said Stevenson Burke and Charles Hickox except to the finding of said master that the American Loan and Trust Company of New York is the holder of 27 bonds mentioned in said report as security upon the note of James M. Ashley and entitled as such to participate in the proceeds of the sale of the railroad property.

2. They also except to the report of said special master in regard to the remaining 85 bonds described in said report, to wit, the bonds numbered from 696 to 716, inclusive, and from 718 to 781, inclusive.

3. They except to the finding and decision of the said master in regard to the 20 bonds numbered from 750 to 779, both inclusive, and to his finding that said loan and trust Co. is entitled to participate in the proceeds of the sale of said railway property.

523 4. They except to the finding and holding of said master as to 5 additional bonds held as collateral security upon a note of $2,000 made by J. C. Short April 7th, 1888.

5. They except to the finding of said report in favor of Henry W. Cannon.

6. They except to the holding of said master in favor of J. A.

Jillson, Wm. Life, Dr. F. Beach, Mr. Wilson, Mr. Clark, Robert Black, Geo. B. Barnes, H. Hamblin, James B. Mott, J. A. Sperry, Eliza M. Church, W. P. Watson, W. F. Day, L. H. Bristol, Geo. A. Scott, C. A. Hopkins, Mary E. Goodwin, Mr. Field, the estate of H. H. Stewart.

7. They also except to the holding of said master in refusing to hold and decide that the said Stevenson Burke and Charles Hickox are the owners and holders of said bonds and solely entitled to the *pro rata* share thereof in the distribution of the proceeds of sale of said property.

8. They also except to each and every finding of fact in said report of said master except the finding that they are the owners of 713 of said bonds, and in support of their said exceptions they refer to the testimony upon file with said report showing that each and every finding of said master is erroneous and prejudicial to their rights, and that each and every finding of said master so made is wholly unsupported by testimony and clearly in conflict with the testimony submitted by said master.

Wherefore they pray that the exceptions to said report may be sustained, and that this court will hold and decide that they are the owners and holders of each and all of the bonds so held and
524 decided by the said master to belong to the several persons and corporations aforesaid, and that such further judgment, order, and decree may be made by the court as justice and equity requires.

STEVENSON BURKE,
CHARLES HICKOX,
By STEVENSON BURKE AND
DOYLE, SCOTT & LEWIS,
Their Att'ys.

525 Afterwards, to wit, on the 2d day of July, A. D. 1890, there was duly entered on the journal of said court the following order, to wit:

Order Suggesting Death of Charles Hickox.

U. S. Circuit Court.

THE AMERICAN LOAN & TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN R'Y CO. and Others. } No. 495. In Equity.

This day came the complainant, The American Loan & Trust Company, by its solicitors, B. F. Blair and E. D. Potter, Jr., and suggested to the court that since the last term of this court one of the defendants, to wit, Charles Hickox, of Cleveland, Ohio, has departed this life intestate, and that one Charles G. Hickox, also of Cleveland, O., has been duly appointed and qualified as the administrator of his estate. On consideration whereof it is ordered

that said action, so far as said decedent is concerned, be and is revived against Chas. G. Hickox as administrator, and thereupon came S. Burke, attorney for said administrator, and enters the appearance of said Chas. G. Hickox as administrator of said estate of Charles Hickox, deceased.

526 Afterwards, to wit, on the 28th day of November, A. D. 1890, there was filed in the clerk's office of said court the following motion, to wit:

Motion for Final Decree.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Complainant, *vs.* THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY and Others, Defendants.	No. 495. In Equity.

And now comes The American Loan and Trust Company, complainant herein, and, upon all the pleadings, decrees, orders, and proceedings in this cause, moves the court for a final decree herein, ordering and directing James M. Ferris, the receiver heretofore appointed in this cause, to submit and pass his final account as such receiver, and referring it to —— ——, Esq., as special master to state and pass said account, and to ascertain the balance, if any, remaining in the hands of said receiver, and requiring said receiver to pay such balance to the clerk of this court to the credit of this action, and granting an allowance to said complainant as compensation for its services as trustee under the mortgage foreclosed herein, and in bringing and conducting this suit and fixing the amount of such allowance and directing the payment thereof out of any fund in court to the credit of this cause, and referring it to said —— ——, Esq., as such special master, to compute and ascertain the net amount of the fund in the hands of the court or subject to its order applicable to the payment of the bonds secured by the
527 mort— foreclosed in this action after the payment of all costs, allowances, and expenses of this suit and the proportionate distributive share thereof payable to the several holders of said bonds as ascertained by the judgment and decree of this court, and directing and requiring Stevenson Burke, Charles Hickox, and Charles G. Hickox, purchasers of the mortgaged property, or the survivors of them, to pay to the clerk of this court the aggregate amount of all sums found payable to all holders of said bonds other than Stevenson Burke and the estate of Charles Hickox, together with interest thereon from the date of the delivery of the possession of the said mortgaged premises and property to said purchasers by said receiver, and also such sums as may be necessary to provide for the payment of all costs, allowances, and expenses of this action

not otherwise provided for, and directing the clerk of this court to pay to the several holders of said bonds, other than said Burke and Hickox, or to their attorneys, out of said fund so paid into court, the sums payable to them severally and respectively as the holders of said bonds, upon the production and surrender to said clerk of the bonds held by them respectively, and granting such other and further relief as to the court may seem meet.

BLAIR & RUDD,
E. D. POTTER, JR.,
Solicitors for Complainant.

528 Afterwards, to wit, on the 8th day of December, A. D. 1890, there was duly entered on the journal of said court the following order, to wit:

Order Overruling Exceptions and Confirming Master's Report.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY *et al.*

This cause came on to be heard at this term of the court upon the report of Special Master A. J. Ricks, made and filed herein on the — day of ——, 1890, and upon the testimony taken and filed by said special master, by which report said special master found and reported that Messrs. Stevenson Burke and Charles Hickox are the owners and holders of 713 of the bonds secured by the mortgage foreclosed in this case, namely, Nos. 1 to 693, inclusive, Nos. 717 and Nos. 782 to 800, inclusive; that the American Loan and Trust Company of New York holds 27 of said bonds, to wit, Nos. 694, 695, and 801 to 825, inclusive, as collateral security for two notes made by James M. Ashley; that the said trust company also holds twenty of said bonds, Nos. 759 to 779, both inclusive, as collateral security for a note for $14,000 made by the American Finance Company; that said trust company also holds five of said bonds, Nos. 712, 737, 738, 741, 746, as collateral security for a note for $2,000 made by J. C. Short; that Henry W. Cannon holds and owns five of said bonds, Nos. 747, 749, 764, 765, and 766; that J. A. Jillson holds ten of said bonds, numbered from 699 to 708, in-
529 clusive, as collateral security for a note of the American Finance Company or of J. C. Short for $8,000; that William Life holds five of said bonds, Nos. 714, 718, 735, 744, and 745; that Dr. F. Beach holds two of said bonds, Nos. 722 and 723, as collateral security for a note of J. C. Short; that Mr. Wilson holds one of said bonds, Nos. 740, as collateral security for a note of $900; that Mr. Clark, of Bridgeport, holds two of said bonds, Nos. 713 and 716, as collateral security for two notes of the American Finance Co. for $750 each; that Robert Black holds one of said bonds, numbered 739, as collateral security for a note of $900 made by said finance Co.; that George B. Barnes holds one of said bonds, numbered 742, as collateral security for a note of said finance company for $400;

that H. Hamlin holds one of said bonds, No. 771, as collateral security for a note of Oscar C. Short for $800; that James B. Mott holds two of said bonds, numbered 715 and 772, as collateral security for a loan of $2,000 made by William A. Minor; that J. A. Sperry holds ten of said bonds, numbered 719, 724, 743, 767, 768, 769, 773, 774, 780, and 781, as collateral security for a note of William A. Minor for $10,000; that Eliza A. Church holds and owns two of said bonds, numbered 720 and 721; that W. P. Watson holds five of said bonds, numbered from 730 to 734, inclusive; that Wilbur F. Day holds one of said bonds, numbered 710, as collateral security for an obligation of J. C. Short for $1,000; that L. H. Bristol holds one of said bonds, numbered 790, as collateral security for an obligation of J. C. Short for $1,000; that George A. Scott holds one of said bonds, numbered 697, as collateral security for an obli*agtion* of J. C. Short; that C. A. Hopkins holds one of said bonds, numbered 696, as collateral security for an obligation of J.
530 C. Short; that Mary E. Goodwin holds and owns five of said bonds, numbered 725 to 729, inclusive; that Mr. Fields holds one of said bonds, numbered 736; that the estate of H. H. Stewart holds two of said bonds, numbered 709 and 748, and that the said several holders of said bonds are *bona fide* holders of the bonds enumerated as held by each of them respectively and are severally entitled to share *pro rata* in the distribution of the fund in this case according to the number of said bonds held by them respectively.

And upon the exceptions to said report filed by the said Stevenson Burke and Charles Hickox herein and upon the suggestion upon the records of this court of the death of said Charles Hickox pending the hearing upon said exceptions and the appearance of his personal representatives herein and upon the decision duly made and filed by the Hon. Henry B. Brown, district judge, before whom the said exceptions were heard at a stated term of this court on the 30th day of June, 1890, whereby the said exceptions to the said report of said special master are overruled, now, on motion of Benjamin F. Blair, of counsel for the several holders of said bonds other than said Burke and Hickox, it is—

Ordered and adjudged that said exceptions be, and the same hereby are, overruled and that the said report of said special master be, and the same hereby is, in all things confirmed.

And it is further adjudged that the several parties above mentioned were at the date of said master's report severally the *bona fide* holders of the several bonds above enumerated as held by them respectively, and that they or their respective assignees are severally entitled to share in the distribution of the fund in court in this cause *pro rata* according to the number of bonds held by them respectively upon the production and surrender of their respective bonds
531 pursuant to such order for distribution as may be hereafter entered herein; from which decree the purchaser and intervening petitioners, Stevenson Burke and Charles G. Hickox, adm'r of the estate of Charles Hickox, deceased, pray an appeal to the next term of the Supreme Court of the United States, which appeal is allowed

and bond for costs for said appeal is fixed at sum of $1,000 and bond for supersedeas is fixed at $200,000; and the defendant The Toledo, Columbus and Southern Railway Company prays an appeal from this order to the next term of the Supreme Court of the United States.

532 Afterwards, to wit, on the 20th day of December, A. D. 1890, there was duly entered on the journal of said court the following order, to wit:

Decree for Distribution, Appeal Allowed, &c.

THE AMERICAN LOAN AND TRUST COMPANY
vs.
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*

This cause now coming on for hearing for final distribution of the proceeds of said sale and allowance to the trustees, receiver, and counsel for the receiver, and the court being fully advised in the premises, it is ordered, adjudged, and decreed as follows, to wit:

1. That there be, and is hereby, allowed to the trustee, the complainant, in full for expenses and counsel fees, the sum of four thousand dollars ($4,000.00) less two thousand dollars ($2,000.00) already paid by order of the court, heretofore entered herein, leaving two thousand dollars ($2,000.00) still to be paid out of the proceeds of said sale.

2. That there be, and is hereby, allowed to James M. Ferris, receiver, the sum of twenty-five hundred dollars ($2,500.00) for services as such receiver, which is ordered to be paid out of said sale.

3. That there be, and is hereby, allowed to Doyle, Scott & Lewis, as attorneys for said receiver, the sum of four thousand dollars ($4,000.00), which is ordered to be paid out of the proceeds of said sale.

4. That there be paid out of the proceeds of said sale the sum of forty-four thousand ($44,000.00) — receiver's certificates issued
533 by said receiver by order of the court, heretofore made herein, together with any accumulated interest thereon, which now amounts to $46,057.50.

5. That there be paid to A. J. Ricks, special master, for his services and expenses in taking testimony in New York and making report as to ownership of disputed bonds the sum of $—.

And it having been heretofore found and adjudged that the purchasers of said property at the sale aforesaid were the owners of and produced to the satisfaction of the court seven hundred and thirteen of the 825 bonds issued by said company and secured by the mortgage herein foreclosed, and that 112 of said bonds were held and owned by others than said purchasers and the amount due for the distributive share of said bonds thus owned by other than said purchasers, it is found and ordered as follows:

The total amount realized from said purchase was..... $600,000 00

Allowances:

To trustees' counsel as above.....	$4,000 00	
To the receiver " "	2,500 00	
To the receiver's counsel.....	4,000 00	
To the receiver's certificate.....	46,057 50	
		56,557 50
Leaving for distribution.....		$543,442 50

to be divided between 825 bonds of $1,000.00 each of like amount and date, which makes the sum of six hundred and fifty-eight and $\frac{70}{100}$ dollars ($658.70) applicable upon each one-thousand-dollar bond.

It is therefore ordered, adjudged, and decreed that said purchasers pay into court within — days from the entry of this decree a sum sufficient to pay to each of the holders of said one hundred and twelve bonds the sum of six hundred and fifty-eight and $\frac{70}{100}$ dollars ($658.70) on each of said bonds, making the sum of seventy-
534 three thousand seven hundred and seventy-four and $\frac{40}{100}$ dollars ($73,774.40), and in addition thereto the amount of the allowances aforesaid, less whatever the receiver has in his possession belonging to said fund; and it is also found and decreed that whereas from the decree of this court rendered at the present term on the issues joined therein as to ownership of the said one hundred and twelve bonds, overruling the exceptions to the master's report and entering a decree against said Stevenson Burke and Charles G. Hickox, administrator of Charles Hickox, and in favor of the other claimants of said bonds, the said Burke and Hickox intending to appeal to the next term of the Supreme Court of the United States, and prayed the court to allow said appeal, which was done, and now desiring to appeal from this order and decree, in so far as it orders the payment of the distributive share of said one hundred and twelve bonds to others than the said Burke and Hickox, the court now allows the said appeal and adjudges that the bond of one thousand dollars ($1,000.00) already fixed in said former order be affirmed and that the said appeal from each of said orders and decrees be allowed upon the giving of said bond of one thousand dollars ($1,000.00) to secure the costs of said appeal, intending that only the one bond for such appeal be given;

And whereas the court further ordered that for a supersedeas the said bond should be in the sum of two hundred thousand dollars ($200,000.00), it is now ordered and adjudged that upon perfecting said appeal by giving the bond for costs as aforesaid the said Burke and Hickox shall have the right, in lieu of the super-
535 sedeas bond so ordered, to deposit with the clerk of the court one hundred and fifty thousand dollars ($150,000.00) of the first-mortgage bonds of the Toledo, Columbus & Cincinnati Railway Company, with the coupons attached thereto, which shall remain in the possession of the court pending said appeal and until final decision thereof, which bonds shall remain at all times as security for

the payment of said sum of six hundred and fifty-eight and $\frac{70}{100}$ dollars ($658.70) on each of said one hundred and twelve bonds, with interest thereon from December 20th, 1890, the date of the decree in favor of said bond claimants other than said Burke and Hickox, and that if the decree of this court on the question of the ownership of said bonds be affirmed by the Supreme Court in whole or in part said bonds shall be held for the payment of the amount owing to said bondholders or any of them respectively, and if the amount due under such decree of affirmance in whole or in part be not paid by said Burke and Hickox or their successors in interest within thirty days from the filing herein of the mandate of the Supreme Court certifying such decree of affirmance that said bonds shall be sold by the clerk of this court for the purpose of paying the sum, or so much thereof as may be necessary, upon such short time and notice and terms as the court may order; and the court, not waiving any remedies and rights heretofore reserved in former orders, still reserves the right, if necessary, to enforce such rights so reserved or any part thereof against the said property or any part thereof, and upon the deposit of said bonds with the clerk as aforesaid the said purchasers shall not be required, in addition
536 thereto, to pay into said court the money thus found due on said one hundred and twelve bonds pending said appeal.

And it is further ordered, adjudged, and decreed as part of this decree that upon the presentation to the clerk of this court of said one hundred and twelve bonds or any of them whenever the holder thereof shall be entitled to the same under the terms of this decree or of any decree of the Supreme Court of the United States for cancellation the said clerk shall pay out of said moneys to each of the holders of said bonds thus producing the same the said sum of six hundred and fifty eight and $\frac{70}{100}$ dollars ($658.70) on each of said one hundred and twelve bonds so produced, with interest from December 20th, 1890, as aforesaid.

If said appeal is not perfected and said one hundred and fifty thousand dollars of first mortgage bonds are not deposited on or before February 15th, 1891, then said purchasers shall pay into court the sum of seventy-five thousand dollars ($75,000.00) in cash, to remain in the registry and abide the further order of the court. It is ordered that upon the depositing of said 150 bonds with the clerk of this court as aforesaid that the order requiring the payment of $75,000.00 in money by said Burke and Hickox be, and the same is hereby, suspended until the determination of said appeal which has been prayed for or the further order of this court.

And it is further ordered that the said Burke and Hickox may at any time withdraw said bonds from the custody of the clerk of this court by paying into court the sum of $75,000.00 in money and any additions thereto, if any, which the court may hereafter order, and the order heretofore made for the paying in of said sum of $75,000.00 is modified so that the deposit of bonds shall take the place of
537 said sum of $75,000 until the determination of said appeal or the further order of the court.

It is also ordered that if said Burke and Hickox deposit said bonds

instead of paying said sum of $75,000.00 into court and any amount is adjudged to be paid by them, either upon appeal or otherwise, that the money in their hands or the bonds, if deposited, shall draw interest at the rate of six per cent. from December 20th, 1890, upon such sums as are or may be found due.

And it is further ordered, upon the payment of said $75,000.00 in money or the deposit of said $150,000.00 in bonds to secure the amount found due to the other parties, holders of said 112 bonds, that said money or said bonds shall be held by the clerk of this court to cover the said liability of said Burke and Hickox or any liability that they may be found to be under to make payment upon account of the purchase of said railroad or otherwise to the holders of said bonds, and, the court having by such order fully protected the rights of the holders of said 112 bonds, it is ordered that an appeal be allowed to the Supreme Court of the United States by said Burke and Hickox, as prayed for, upon their giving bond to the approval and satisfaction of the clerk of this court, as provided by law, in the sum of one thousand dollars.

The allowance of $— heretofore made to A. J. Ricks as special master shall be paid out of funds in the hands of the receiver.

And it appearing to the court that there are sundry claims against the receiver undetermined, one of which is now pending in the Supreme Court of the United States, which will make the final
538 adjustment of his accounts for the present impossible, such settlement is postponed until said claims are adjusted. Any balance which may then be found in his hands after his accounts have been passed upon by the master heretofore appointed will be distributed *pro rata* among the beneficiaries under this decree as herein declared upon orders to be hereinafter made when such balance is finally determined.

And thereupon came Stevenson Burke and Charles Hickox, administrator of Charles Hickox, and prayed an appeal from this decree to the next term of the Supreme Court of the United States, which appeal is allowed upon the terms and conditions hereinbefore prescribed.

It is further ordered, for good cause shown, that the time for the filing of a transcript of said cause for appeal to the Supreme Court is hereby extended to April 1, 1891.

539 Afterwards, to wit, on the 4th day of February, A. D. 1891, there was filed in the clerk's office of said court the following appeal bond, to wit:

Know all men by these presents that we, Stevenson Burke and Charles G. Hickox, as principal-, and John H. Doyle, John J. Shipherd, as suretics, are held and firmly bound unto the American Loan and Trust Company, for its own use and for the use and benefit of all parties interested in the decree hereinafter mentioned, in the sum of one thousand dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 31 day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-bounden Stevenson Burke and Charles G. Hickox, administrator of the estate of Charles Hickox, have appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, western division, bearing date the 20th day of December, A. D. 1890, in a cause wherein the said The American Loan and Trust Company was complainant, and in which the said complainant, The American Finance Company, and others were intervenors as against said Stevenson Burke and Charles Hickox, and in which the decree held that said Burke and Hickox were not the owners of a certain 112 bonds in said pleadings described, but said complainant and others were respondents: Now, therefore, the condition of this obligation is such that if the above-named appellants, Stevenson Burke and Charles Hickox, administrator, shall prosecute
540 their appeal with effect and pay all such damages, costs, and expenses as shall be awarded against them as such appellents therein, then this obligation to be void; otherwise to remain in full force and effect.

STEVENSON BURKE. [SEAL.]
CHAS. G. HICKOX,
Administrator. [SEAL.]
JNO. J. SHIPHERD. [SEAL.]
JOHN H. DOYLE. [SEAL.]

Sealed and delivered in presence of—

ALBERT STRAUS.
H. D. MORAN.

On the back of said bond is the following endorsement: "Approved and filed February 4th, 1891. M. W. Sanders, clerk."

541 UNITED STATES OF AMERICA, } ss:
Northern District of Ohio, Western Division, }

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of the proceedings had in said court upon the question to ascertain the holders of certain bonds in the suit pending in said court wherein The American Loan and Trust Company was complainant and The Toledo, Columbus & Southern Railway Company and others were defendants, and the original bill and order appointing a receiver in said case showing the jurisdiction of said court in said suit wherein the aforesaid question was raised, and that the said copies are taken from the original files and records of said court now remaining in my custody.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Toledo, in said district, on this 14th day of March, A. D. 1891, and of the Independence of the United States of America the 115th year.

IRVIN BELFORD, *Clerk*,
By HALLIE W. BROWN, *Deputy Clerk*.

Endorsed on cover: Case No. 14,529. N. Ohio C. C. U. S. No. 676. Stevenson Burke and Charles G. Hickox, administrator of Charles Hickox, deceased, appellants, *v.* The American Loan and Trust Company. Filed March 20, 1891.

NOV 3 1894
JAMES H. McKENNEY,

In the Supreme Court

OF THE

UNITED STATES.

102

OCTOBER TERM 1894.

STEVENSON BURKE and CHARLES G. HICKOX, Administrator of CHARLES HICKOX, Deceased,
Appellants,

vs.

THE AMERICAN LOAN & TRUST COMPANY, et al.,
Appellees.

Brief for the Appellants.

STEVENSON BURKE.

DOYLE, SCOTT & LEWIS,
of Counsel.

THE O. S. HUBBELL PRINTING CO., 104 Sheriff Street.

In the Supreme Court

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UNITED STATES.

OCTOBER TERM 1894.

STEVENSON BURKE and CHARLES G. HICKOX, Administrator of CHARLES HICKOX, Deceased.

Appellants.

vs.

THE AMERICAN LOAN & TRUST COMPANY, et al.,

Appellees.

This case comes into this court by appeal from a final order and decree of the Circuit Court of the United States for the Northern District of Ohio, Western Division, distributing to different bondholders or claimants the proceeds of the sale of the Toledo, Columbus & Southern Railway.

The question of distribution of proceeds, including the rights of the different claimants to participate in the distribution, was referred to a master, who made his final report to the court. (See Record, p. 185 to 190.) In this report he decided that sundry claimants, whose names are mentioned in the report, were entitled to 83 bonds and to participate in the distribution of the proceeds of sale, which bonds were claimed by the appellants.

Exceptions were taken to the master's report by the appellants. (See Record, p. 313) which exceptions, upon final hearing before the Circuit Court, were over-ruled, and the report of the master confirmed. (See Record, p. 316.) From this final decree of the Circuit Court confirming the report of the master and decreeing distribution in accordance with his report, the appellants have appealed to this court, and they here assign for error the confirmation of the master's report, and the decree of distribution in accordance therewith.

The contention involves the ownership of 83 bonds of the Toledo, Columbus & Southern Railway Company. Both parties claim title under T. P. Brown. The appellants claim the bonds under the contract entered into with Brown December 15, 1886, which contract is in evidence. (See Record, p. 210-11.) The Finance Company, and those claiming under it, claimed the ownership of the bonds under the contract dated April 14, 1884, and the contract between Brown and the Finance Co. and Mason & Jillson, dated September 24, 1884. (See Record, p. 140 to 151.) The Finance Co. and those claiming title under it contend that the bonds were delivered to the Finance Co. in payment for services before that time, rendered to Brown, or that they were delivered in payment for services to be rendered in the sale of the 800 bonds.

The substantial question to be determined is, were the bonds delivered to the Finance Co. in payment for services, or were they placed in the hands of the Finance Co. to be applied in payment for services, wherever the services were rendered?

This question must be determined by a construction of the written agreements entered into by the parties, and the relevant testimony, if any, contained in the record bearing upon the subject. It is conceded that the consideration to

be paid by the Finance Co. for the 80 bonds was the negotiation and sale of 800 bonds of the Railway Co. (See Record, p. 148.) It is also conceded that the Finance Co. never did sell the 800 bonds in question, or any of them.

It is obvious therefore, if the Finance Co. and those claiming under it can hold the bonds, that they hold them without any consideration whatever. The above mentioned contracts between Brown and the Finance Co. show that the Finance Co. in all this business acted as the agent and in behalf of Brown. That the contracts in question were drawn up by Mr. Short, the President of the Finance Co. Under the circumstances three well known cardinal rules of construction may be invoked to aid us in solving the question before us.

1. To place ourselves in the situation of the parties at the beginning, and follow in their footsteps until the delivery of the bonds.

2. To ascertain from what they reduced to writing, and the situation and subject matter of the written contracts, their intentions.

3. That in cases between principal and agent, when the agent's writings are to be construed, they shall be taken most strongly against himself, and all doubtful questions resolved against him.

As we have pointed out, there were two contracts executed by and between the parties before the bonds were delivered. The contract of April 14, 1884 (See Record, p. 140) and the contract of September 24, 1884 (See Record, p. 148.)

The purpose of the first contract was twofold. First, by the procurement of the temporary loan of $300,000 or $400,000 to relieve Brown and the Railway Company from debt, and reclaim the bonds of the Railway Company from sundry persons to whom they stood pledged. Second, sell

and dispose of the bonds and repay the temporary loan, together with commissions and expenses, and reinstate Brown in the possession and control of the railway.

The Finance Co., under the first contract, negotiated the temporary loan from Mason & Jillson of $325,000, but before any money was paid, and preliminary to its payment, the tripartite contract of September 24, 1884, was entered into, the temporary loan made, and the bonds delivered under the contracts so written and executed. Brown and the Railway Company were in financial straits, and ready to submit to hard terms for relief. Short, the astute and sharp President of the Finance Company, a man uneducated in legal technical language, reduced the contracts to writing. And the real question is, do these contracts show that the 80 bonds were intended by the parties to be delivered to the Finance Co. in payment for its services past, or to come?

Do they show that the bonds were delivered to the Finance Co. in payment as *its* property, or as the property of *Brown* in its custody? It is not claimed that the bonds were bestowed by Brown upon the Finance Co. as a gift. Nor is it claimed that at the time of the delivery commissions to the amount of $80,000 had been earned, nor that any other commission than the commission of 2½% upon $325,000, the temporary loan, had been earned. It is claimed only that the bonds were delivered to the Finance Co. in payment for services, rendered or to be rendered.

The first contract is by reference incorporated in the second, so that the two contracts, so far as Brown and the Finance Co. are concerned, and so far as they relate to commissions, must be taken and construed together. There was an interval of over five months in their execution. There is little room for contention as to the compensation under the first contract. Section 6 provides—"There is to

be allowed and paid to said party of the second part, in consideration of the premises, a commission or compensation of 2½ per centum on the amount of money raised by said party of the second part for said party of the first part, by way of loan, or by means of the settlement of claims or obligations. Said commission or compensation to be payable at such time as the money received from such loan or loans shall be paid over to said party of the first part by the said party of the second part, or as the existing obligations secured by the pledge of bonds as collateral shall be taken up, and said liens and other claims shall be paid by said party of the second part, it being understood that the commissions mentioned in this article will have been earned by said party of the second part whenever the settlement shall be brought about as a result of this agreement."

This section relates to the commission of 2½ per cent for the temporary loan—which confessedly, has been paid.

Article 7 provides that the Finance Co. may negotiate the sale of 800 bonds in affecting the settlement of the claims, but at not less rate than 90 per cent and accrued interest.

Article 9 provides—"Said second party is to receive in consideration of the premises a commission or compensation of ten per centum on the face or par value of the bonds and stock issued and to be issued by the said Railway Company and negotiated, said 10 per centum on said bonds being payable in said bonds at par, and on said stock in said stock at par—such payments or deliveries to be made *from time to time, pro rata, as any of said bonds shall be negotiated*, sold or exchanged for outstanding liabilities, or for property, labor or materials required by said Railway Company, or either of them, or otherwise used or disposed of."

Article 10 provides—"In addition to the said 10 per centum of stock hereinbefore agreed to be paid to said

party of the second part as hereinbefore mentioned, in further consideration of the premises and of its undertaking to secure the marketing of said bonds, the 45 per centum of the capital stock of said new Railway Company, the same to be issued and delivered to the said party of the second part *pro rata from time to time as said bonds, or any of them, shall be negotiated* and otherwise disposed of, as provided in paragraph last above written."—Section 9.

The Finance Co. was unable to make a satisfactory disposal of the bonds. The claims of creditors were urgent, and considerable correspondence was had between Brown and the Finance Co. The only part of it claimed to have any bearing on this contention is the one dated September 16, 1884, and addressed by Short to Brown. (See Record, p. 275 to 277.)

We contend that this letter is wholly inadmissible. That it preceded the contract known as the tripartite contract. (See Record, p. 148 to 151)—and it is expressly denied by Brown that he assented to its terms, or that he ever wrote any letter accepting or agreeing to its terms. Moreover preceding the tripartite contract dated September 24, 1884, it must be presumed to be merged therein.

It must be ruled out. But where this letter is considered in or out of the record, it is of small consequence. It is evidently a skillful and bright attempt upon the part of Short to circumvent and over-reach his principal, and induce him to enter into a contract destructive to his interests. (See Record, p. 275-277.)

For the first time he intimates the necessity of the bonds all being put in one place, until it is seen "*what the outcome shall be.*" He compliments extravagantly the proposed contract with Mason & Jillson, which was really drawn by himself, and adds—"They want all the bonds, so far as possible, to be deposited in one place, and have therefore pro-

posed that all the bonds outstanding, and the $650,000, which go with the notes, shall be left with a trustee to be agreed upon *until it is known what the outcome is to be*. These bonds can be withdrawn of course at any time that *you*, and *we*, and *they* agree. Our Company cannot afford, of course, for the little 2½ per cent. commission on the loan only to use its position and capital to set the road on its feet, and take the risk of your death and any contingency that might otherwise arise, and hence, we and Messrs. Mason & Jillson are treating the negotiation as a sale of the road. But in doing this our Company extinguishes all its claim for commissions so far as the present operation of the loan is concerned, and so our Company also puts its $80,000 bonds in *trust* along with yourself and others, and we will not be entitled to any commission on the bonds of the new Company to be issued to take up the old. No doubt there will be points for you and them to discuss in detail, and I have arranged for them to be here to see you when you come."

To this letter Brown replied (See Record, p.) neither accepting nor rejecting the offer, but agreeing to meet Mr. Short and Mason & Jillson, and take up the question. It is true that in the testimony of Short it is stated that Brown wrote accepting the terms of this loan. This Brown expressly denies, and Short has failed to produce that letter, or any other letter of that date or bearing upon the subject except the one contained in the record, above mentioned.

This is all the information we have of what transpired, or was agreed to prior to the parties meeting in Providence upon the 24th of September 1884, when the tripartite and supplemental contract between them was agreed to and reduced to writing. And of course, what was finally agreed to and reduced to writing between the parties is the best evidence, indeed the only evidence, of the actual agreement

between them. This contract provides for the loan by Mason & Jillson to Brown of $325,000. It makes the first contract by recital a part of the second, and the second relates chiefly to the protection of the interests of Mason & Jillson, who have agreed to furnish the $325,000 of money required to take up the debts of the Railway Company.

Section 5 of that agreement provides "All the $800,000 full paid stock of said Toledo & Indianapolis Ry. Co., except a nominal amount thereof held by the Directors for qualification, is also to be issued and deposited with said American Finance Co., and is to be disposed of as follows upon the payment of said loan (the temporary loan of $325,000) or in case of default of such payment there is to be issued and delivered by said trustee to said parties of the third part—Mason & Jillson—$360,000 of said stock, to said Brown $408,000 thereof, and to said American Finance Co. $32,000 thereof."

Section 6. "A bonus of 10 per cent on the amount of bonds pledged as collateral security for the payment of said notes is to be paid to the purchasers of said notes at the time of said purchase, in the first mortgage bonds of said Toledo & Indianapolis Ry. Co. at par."

Section 7 provides for the disbursement and assignment of the outstanding claims, and Section 8 provides for the deposit in some trust company of the $325,000 to the credit of the Finance Company, as trustee for disbursement.

Section 9 is the section mainly relied upon by the appellees in this contention. It provides—"All the remainder of said $800,000 of first mortgage bonds of said Toledo & Indianapolis Ry. Co., over and above the $650,000 of the same pledged to secure the payment of said $325,000 of said notes, are hereby appropriated as follows.—

1—To the purchasers of said notes their said bonus, amounting to $65,000 thereof, to be distributed among them

pro rata according to their respective holdings of said bonds. 2—To said American Finance Co. $80,000 in full payment of all its claims for *commissions for negotiating said $800,000 of said bonds*. 3—To said Brown $5,000 thereof. Such appropriations and delivery of said bonds to be made from time to time as said notes are disposed of."

Immediately after the negotiation of this loan the commission of 2½ per cent for procuring the loan was paid in full to the Finance Co., it being charged to Brown and deducted from the money borrowed of Mason & Jillson, and charged up in the first account rendered to Brown. (See Record, p. Exhibt No. 12, where Brown is charged—"To commissions, American Finance Co., for the negotiation of notes to Mason & Jillson—$8,125.00.")

The amount of compensation for selling the bonds, the manner and time of payments, are clearly specified in the original contract.

Section 9 provides, First, that the commission or compensation shall be 10 per cent on the face or par value of the bonds and stock issued and to be issued by said Railway Company and negotiated, said 10 per centum on said bonds being payable in said bonds at par or in the net cash proceeds of the sale thereof, at his option, and on said stock in said stock at par. Such payments or deliveries to be made from time to time pro rata as any of said bonds shall be negotiated.

Section 10 also provides for the time and manner of payments, as follows—"In addition to the said 10 per centum of stock hereinbefore agreed to be paid to said party of the second part as commission there is to be appropriated and transferred to said party of the second part as hereinbefore stated, in further consideration of the premises, and of its undertaking to secure the marketing of said bonds, the 45 per centum of the capital stock of said new

Railway Company, the same to be issued and delivered to said party of the second part *pro rata from time to time as said bonds, or any of them, shall be negotiated.*" The terms of payment so distinctly stated are in no respect changed or modified by the supplemental or tripartite contract. The tripartite contract obviously was intended to define the rights of the new parties making the loan, but not to change the compensation or commissions of the Finance Co. for its part as broker in the business. The tripartite contract contains no new agreement as to the payment of commissions.

The 9th Section thereof no doubt was the outgrowth of the suggestion in the letter of September 16th, above cited, as to a deposit of the bonds. The two contracts upon the subject of commissions must be read together. The 9th section of the tripartite contract makes it plain that the 80 bonds were to be appropriated—(the word appropriate appears frequently in the contracts, and even in the letter of Mr. Short)—to said American Finance Co. $80,000 thereof in full payment of all its claims for *commissions for negotiating said $800,000 of said bonds.* The time of such payment, and the agreement as to when such commissions shall be earned is clearly specified in Sections 9 and 10 of the first contract above cited. It is not pretended that at the time the bonds were delivered to the Finance Co. there was $80,000 due for commissions or other services. It is made clear by the words of the contract that the bonds were not to be delivered in payment of any other services than for services in negotiating the $800,000 of bonds, a service which it is not claimed has as yet been performed.

The letter of Short to Brown, of September 16, 1884, suggests that the bonds were to be deposited in one place, in trust, "*until it was seen what the outcome would be.*"

What outcome? Manifestly not the temporary loan negotiated with Mason & Jillson, but the outcome of the disposal of the $800,000 in bonds, upon the disposal of which the commissions were to be earned.

If it was the understanding of the parties that the bonds were to be turned over absolutely to the Finance Co. as its own property, what need for the bonds, or any of them, to go into the hands of a trustee?

By the terms of the tripartite agreement 650 of the bonds were to be used to secure the payment of the loan of $325,000; 10 per cent of these collateral bonds was to be paid absolutely as a bonus to the persons who furnished the $325,000. This disposed absolutely of 715 of the 800 bonds. There was left but 85, to go into the hands of a trustee, 80 of which are now claimed by the Finance Co. to have been paid absolutely over to it for services. 5 of the bonds were to be retained by Brown. As Brown was the owner, and retained the bonds as owner, there was no occasion for a trustee to hold his bonds.

And if, as contended, the 80 bonds were turned over to the Finance Co. as its own property, there was no need of a trustee to hold them. Nor can various expressions in the letter so much relied upon by the appellees be reconciled with the contention that the 80 bonds were delivered to the Finance Co. absolutely as its property.

The proposition that all the bonds outside the $650,000, which went with the notes as collateral security, should be deposited with a trustee to be agreed upon, until it is known what the outcome is to be, is utterly inconsistent with the delivery of the bonds to the Finance Co. as its property.

There were but 800 bonds in all. 650 of them were to go directly into the hands of the lenders of the $325,000 in money. 65 of the 150 left were to go to the lenders as a

bonus, leaving but 85 of the 800 bonds. 80 of them, as now contended, belonged to the Finance Co. absolutely. The other 5 belonged to Brown absolutely. What need then, for a trustee to hold the bonds which belonged absolutely, as contended, to those different claimants? It is simply impossible to reconcile these several contracts, and even this letter of Short's, with the claim that the bonds were turned over to the Finance Co. absolutely in payment for work confessedly not done at the time, and which never has been done.

And when it is considered that these contracts were drawn by Mr. Short, acting as the agent of Mr. Brown in the negotiating, it is but reasonable and fair that all doubts should be settled against him, and in favor of Brown. And the more so when it stands confessed upon the face of the record that the $80,000 in bonds so taken away from Brown were never paid for, and that no commissions for the negotiation of the sale of the 800 bonds were ever earned.

It is urged that the expressions in the 9th section of the new contract. "Such appropriations and the delivery of said bonds to be made from time to time, *pro rata*, as said bonds are disposed of" applies to the 80 bonds delivered to the Finance Co., and to the 5 bonds delivered or left in the possession of Brown, as well as to the 650 bonds turned over with the notes as collateral, and the 65 bonds that went with the notes as a bonus. But this suggestion is manifestly erroneous. The *pro rata* of Section 9 has reference only to the 650 bonds, and the 65 bonds, which was to go with the notes as a bonus.

The accounts filed show that the money was not all paid over at once. It was paid over from time to time, and so in the very nature of the case the bonds to secure the notes, and the bonus bonds, could not all be delivered at once. Obviously the *pro rata* could not apply to the 80 bonds

delivered to the Finance Co., if they were, as contended, delivered in payment, and if they were deposited with the Finance Co. awaiting what the outcome should be, as indicated in the letter of September 16, 1884, or for appropriation *pro rata* according to Sections 9 and 10 of the first contract there was nothing in either case to make their delivery or appropriation depend upon the disposal of the notes given for the loan which the Finance Co. had negotiated.

The 11th section of the tripartite contract confirms this view.

It provides for the bonus of $50,000 in bonds to the lenders of the $325,000 in money, for their personal services in connection with the loan, and perhaps with the reorganization of the Railway Company.

And it provides that "When said bonds are sold, and said loan is paid, and said Brown is entitled to receive the excess over and above the payment of said note, said Mason & Jillson are to receive $50,000 of said bonds, or the proceeds of sale thereof, to their own personal use."

This shows that the parties contemplated *that the 800 bonds were still to be sold.* Indeed, the contracts clearly show that it was expected that the money to repay the loan of $325,000 would come from the sale of the bonds. All parties understood that that was the only means of payment possessed by Brown, or the Railway Company.

The first step to be taken by the Finance Company was to raise temporarily $325,000 to put the road on its feet. For this it was to receive a commission of 2½ per cent. in money, which commissions, confessedly, have been paid.

The next step was to sell the bonds at not less than ninety cents on the dollar, and from the proceeds to repay the $325,000 borrowed, and for those services when accomplished, or *pro rata* as accomplished, the Finance Co. was to receive its commission of 10 per cent. amounting in

all to 80 bonds. There is nothing in the supplemental contract to show that the parties intended to supercede the first contract as to commissions to be paid.

The $325,000 was borrowed from Mason & Jillson at the time, or after the execution of the second contract. The first contract was between Brown and the Finance Co. only. *That contract alone provides for the commissions to be paid, and the time and order of payment.* By its terms two commissions are to be paid, to wit, 2½ per cent on the $325,000 temporary loan, and 10 per cent. on the bonds negotiated, to be paid "*pro rata as negotiated*, and 10 per cent on the capital stock of the money to be paid *pro rata as the bonds were negotiated.*" See (Sections 9 and 10, Record, p. 143-4).

Soon after the temporary loan of $325,000 was made, to wit, October 24, 1884. (See Record, p. .) The Finance Co. collected from Brown the 2½ per cent commission on said loan, showing its understanding of the contract, and showing clearly that they did not regard that transaction as suggested in his letter as a sale of the railway, or of the first bonds. Indeed, there is no contention, and never has been that the 2½ per cent paid as commissions for the temporary loan was paid under the first contract. There is no other contract under which it could have been paid. If Sections 9 and 10 of the first contract remained in force after the date of the supplemental contract then there is no room to doubt that whether the bonds were deposited with the Finance Co. or elsewhere payment of commissions was to be made "*pro rata, from time to time, as earned.*"

We do not understand counsel to deny that the original contract remained in force. Confessedly it was the only contract under which the 2½ per cent commissions, afterwards claimed and paid, was due or earned. The court cannot treat that contract as terminated September 24, 1884, by the new contract, and if not then it is clear that

the commissions were to be paid "from time to time as the bonds are negotiated." Much stress is laid by counsel for the appellees upon the closing paragraph of Section 9 in the second contract, to wit, "Such appropriations, and the delivery of such bonds to be made from time to time as said notes are disposed of.

It is contended that these words apply to the 80 bonds This is incorrect. As pointed out we understand these words to apply only to the 650 bonds and 65 bonus bonds that went to the lenders of the $325,000. That money was not all to be paid at once, hence the bonds and bonus bonds to the lenders were not all to be delivered at once, but only pro rata, from time to time as the notes of Brown, given therefor, were disposed of—that is, as the money was actually paid.

Why should the payment of the 80 bonds to the Finance Co. as commissions depend upon the delivery of the *notes?* Confessedly, the commissions upon that loan were 2½ per cent, which were paid from the first money received from Mason & Jillson. Clearly the five bonds retained by Brown were not to be so delivered, and if counsel is right in his contention that the bonds were to be delivered *pro rata* as the notes were disposed of then he is wrong in his contention that they were to be delivered to the Finance Co. absolutely in payment of commissions.

By the first contract there was no obligation to place any of the bonds in the hands of the Finance Co. until they were sold or negotiated. For by the supplemental contract the 80 bonds required to pay their commissions were deposited in their own hands, to be applied in payment of commissions "pro rata from time to time, as the bonds were negotiated."

The new contract simply made the Finance Co. the *custodian* of the 80 bonds, to pay its commissions. But it

made no change either in respect to the time of payment or in the contract, and under the contract payment was to be made only as the commissions were earned. We conclude therefore that both contracts constitute the entire agreement between Brown and the Finance Co. as to commissions. That both are in force and to be construed together. That the 80 bonds were appropriated to pay commissions according to the 9th Section of the first contract "pro rata, from time to time, as the bonds are negotiated." That it was not the intention of the parties to pay commissions only as they were earned. That no bonds were negotiated by the Finance Co. and no commissions earned, therefore the Finance Co. acquired no title to the bonds.

The master therefore clearly erred in holding that the bonds when delivered to the Finance Co. under the contracts became the property of the Finance Co. The title of the Finance Co. became by such delivery no better than that of any other bailee for a use or purpose which never happened.

The observations in regard to the 80 bonds apply with equal force to the 3 other bonds, which were subsequently delivered from the new issue, as testified to by Brown. When Brown called for the 25 bonds, his due for construction, the Finance Co. insisted upon its right to retain its commission of 10 per cent—the same as it had retained the 80 bonds. Being unable to divide the third bond, 3 of the bonds were retained by the Finance Co. and 22 were delivered to Brown, so that those 3 bonds stand upon the same footing as the 80 bonds.

Whatever of possible doubt or confusion exists in the interpretation of the agreements between the Finance Co. and Brown for services grows out of the supplemental contract. Short drew both contracts. He was the agent of Brown in the negotiation with Mason & Jillson, and any-

thing doubtful in the contract must be taken most strongly against him.

In view of all the facts in the record it seems to us very clear that the bonds were delivered to the Finance Co. with a view to the payment of its commissions from them as and when the commissions should be earned. Indeed, the statement is distinct in the 9th section of the second contract that the bonds are delivered in full payment of the commissions for negotiating $800,000 of the bonds. Evidently that is something which remained to be done, for up to that time the bonds had not been negotiated, and they never were negotiated at any time, and no commissions were ever earned.

As we have said, the Finance Co. was the agent of Brown in this transaction, and the rules of construction applicable to transactions between principal and agent are applicable here. Short, as President of the Finance Co., drew the contracts, and if there is any uncertainty or doubt in their construction, that doubt must be settled in favor of Brown, and not against him. The words of the contract are the words of the agent, the Finance Co., and if they are susceptible of two meanings the meaning as most favorable to Brown as the principal must be adopted.

How then stands the question? It stands confessed and expressed in strong clear words that the 80 bonds delivered to the Finance Co. were delivered to the Finance Co. as the agent of Brown, to pay its commissions for the sale of the 800 bonds. What did the parties contend by this? Both knew that no bonds had then been sold. Did they mean that the 80 bonds were to be the property of the Finance Co. whether the 800 bonds were sold or not? The Finance Co. was the agent of Brown. It had no other right to the bonds than as his agent, or as compensation for service rendered. The rules applicable

to dealings between principal and agent, and in the transaction of contracts between them, drawn by the agent, must be applied in this case, and the question, it seems to us, is a plain one.

The first contract, in clear plain words, provides for two duties to be performed by the Finance Co. for Brown's benefit, one to be paid for by a commission of 2½ per cent —the temporary loan—and 10 per cent for the other, to be paid from time to time as the bonds are negotiated. The first duty has been performed, and the commission of 2½ per cent paid. The second duty has not been performed, but the bonds placed in the hands of the Finance Co. to be applied in payment pro rata from time to time, as the bonds were sold or negotiated, have been misappropriated by Brown's agent the Finance Co., and converted to its own use as if they had been earned.

Short's pretense in his evidence, but as suggested in his letter of September 16, 1884, is that the negotiation of the loan of $325,000 is to regarded as a sale of the 800 bonds. This is the best excuse that he is able to put forward for retaining without consideration the bonds of his principal. If it were true that he was to receive the 80 bonds for the negotiation of that loan, how does it happen that upon the loan being consummated he promptly charged to Brown 2½ per cent commission according to the original contract for that service? If his present contention is true that the one negotiation took the place of the other then he was not entitled to that commission, but the fact that he claimed it and received it without question or contention shows that both parties understood that both commissions were to be paid, but that they were to be paid only when earned. Clearly, if the negotiation of the loan was to take the place of the sale of the bonds, and the Finance Co. was to be paid $80,000 commissions upon that account, it was not

entitled to the commission of 2½ per cent. amounting to $8,125, for the negotiation of the loan.

Suppose the bonds instead of having been deposited with the Finance Co. had been deposited with some trustee as suggested in the letter of Short of the 16th of September, could it be maintained for a moment that without rendering the services for which the commission was to be paid that the Finance Co. would be entitled to the bonds? It stands confessed that no commissions have been earned. It stands confessed that the sole consideration upon which the Finance Co. was to own the 80 bonds was in payment for commissions, which commissions have not been earned.

The master, it is true, suggested that the Railway Company was to be put upon its feet by the loan of the $325,000. That, in a certain sense, is true. But that service was paid for according to the contract, and the lenders of the money were paid to their satisfaction.

It seems clear therefore, that as between the Finance Co. and Brown it was not entitled to any bonds by way of commissions.

II. THE CLAIM THAT THE HOLDERS ARE BONA FIDE HOLDERS IN THE COMMERCIAL SENSE.

It is claimed, and found for that matter by the master, that the several holders of the bonds are *bona fide* holders in the commercial sense. If the first fact is established, that as between Brown and the Finance Company the ownership of the bonds passed to the Finance Company, no complaint can be made of this finding of the master, but if we are right in our contention that the ownership of the bonds did not pass to the Finance Company, then the master is clearly wrong in his finding that the several holders of the bonds are *bona fide* holders, or holders upon any better title than the Finance Company.

The report of the master shows that many of the bonds are held by persons who received them as dividends from the Finance Company they being stockholders therein. The evidence shows that William Life holds several of these bonds as a dividend received on stock.

Watson, the secretary of the company, holds five of them as appears by the master's report on page 3, received as a dividend from the Finance Company.

The estate of H. H. Stewart holds two bonds also received as a dividend.

Yet the master finds that these stockholders of the Finance Company who received their bonds from the Finance Company as a dividend, without any other consideration, are *bona fide* holders.

Just what the master means by *bona fide* holders we must confess ourselves unable to understand.

We will proceed to deal with the claims of these different claimants in detail.

On this point we must refer the court to the different motions, pleas, etc., filed upon the day of the confirmation of the sale upon the various hearings for reconsideration and setting aside the sale, to show the great variety of claimants and claims made to the outstanding bonds, not one of which is produced before the master. It may be safely stated that there is no precedent for such a multitude of bona fide holders of outstanding bonds as we have presented here upon the record.

If there was nothing more to submit, the facts appearing upon these various motions, petitions, affidavits, etc., would be sufficient to defeat the claimants in this contention. Passing these things, however, and coming to the evidence, what we are most struck with is the indecent haste and persistent efforts of the American Finance Company to rid itself of the actual possession of the bonds in

question. Nothing could afford a stronger proof of an inward conviction upon the part of the officers of that company that they have no title to the bonds, than the haste and persistence displayed in apparently getting rid of them.

The different claimants are as follows:

1. The American Loan and Trust Company.

After sundry and divers attempts to deprive the master and the court of jurisdiction and sundry speeches by Mr. Crow and Mr. Fowler, and others, Mr. Fowler proceeds with his evidence and calls first, Morris K. Decker (see evidence, page 4); he is the assistant secretary of the American Loan and Trust Co., and claims that the American Loan and Trust Co. holds certain bonds as security for several loans made to the president of the company, Mr. Hazzard, or to J. M. Ashley or both; twenty-seven of these bonds were of the higher number, numbers above 800, except two of them, and they are known in this contention as the Hocking bonds; the others are part and parcel of the 80 bonds in contention, except possibly two bonds that went with the ten thousand dollar note, parcel of the $325,000 loan, which belonged to the American Loan and Trust Company or to the American Finance Company. As to the twenty bonds being numbered 750 to 779, on page 5 Mr. Decker says, that they made this loan September 13, 1887.

The record of the contention in New York is put in evidence by both parties and that record shows that the American Loan and Trust Company was a party to the litigation and therefore had the amplest notice in regard to the claim of Brown and of those who here claim the bonds under him.

Nothing more is necessary to be said upon this point than that the title of the American Loan and Trust Company stands or falls with the title of the American Finance Company, which we have discussed in our first proposition.

As to the 27 bonds, we will submit what we have to say upon that point under a separate head.

It will be observed that of all the varied claimants of the bonds in question, the American Loan and Trust Company is the only claimant appearing in person or by its own officer or officers to claim the bonds: the American Loan and Trust Company even has not brought the bonds within the jurisdiction of the court or in any way submitted them to the master. For aught that we know they may have transferred to some other bona fide holder.

(2. Chase National Bank claim.

The Chase National Bank, or Mr. Cannon, claims to own five of the bonds. The Chase National Bank is an institution located in New York. Mr. Cannon, the president, is in New York every day and still Mr. Cannon failed to appear before the master in support of his claim of being a bona fide holder of the bonds in question. He sent in his stead Mr. Augustus Wetmore, Jr. He produced the bonds and gave their number. Wetmore on page eight of his evidence swears that the bonds belong to Henry W. Cannon: that his occupation is president of the Chase National Bank; the coupons of January and July 1886, have been torn off and then pinned on: Mr. Wetmore swears that Mr. Cannon "gave me the money to pay for the bonds." He states however that the money was in a check: that he don't know whether the check was ever presented or paid: he don't know how much the check was: he don't know to whom he delivered the check nor from whom he received the bonds: the check was the individual check of Mr. Cannon.

It seems then not to have been a transaction of the bank but to have been a personal transaction of the president of the bank. The witness don't know whether he procured the bonds in a broker's office, nor where he procured them nor what was paid for them nor whose money was paid for them.

The attention of the witness on cross examination was called to his lack of knowledge and he agreed to investigate and bring before the master additional information, but with the attention of the witness and Mr. Cannon called to it nothing is produced before the master touching the payment for these bonds.

Surely no claim of bona fide purchaser can be supported upon such slight testimony, to call it by no other name, as is presented here. If Mr. Cannon had been in earnest in regard to the ownership of these bonds, if he was in fact a bona fide purchaser and put any real money into them, he would have appeared before the master, given his testimony and submitted to a cross examination.

(3.) J. A. Jillson, 10 bonds.

Here again it is proper to state that neither Mr. Jillson nor the bonds are brought before the master. Mr. Miner, an officer of the American Finance Company, is brought forward to do the testifying in this case and he undertakes to show where thirty-four of the bonds, parcel of the eighty bonds in contention are, and he says that ten of them, in so far as he knows, are in the possession of Dr. J. A. Jillson, of Poughkeepsie; it is not far from Poughkeepsie to New York and if Dr. Jillson was really the owner of ten of these bonds, it would not have troubled him very much to put in an appearance and inform the master himself as to his ownership, but he prefers to be silent upon that question, and the only presumption to be drawn from such silence is that if he spoke his case in that respect would be ruined. Indeed, there is nothing to show that Dr. Jillson feels or has any personal interest in the matter. His case is supported, if at all, by the evidence of an officer of the American Finance Company, that if our contention is maintained has been engaged in the fraudulent appropriation of these bonds. There is no other evidence in support of the claim of Dr.

Jillson; no evidence that he still holds the bonds; for aught that we know they may be in the hands of some actual bona fide holder; that is very improbable; but they may be in the hands of some person who can claim with as good a grace as Dr. Jillson to be a bona fide holder.

(4.) William Life claims two bonds, or rather the Finance Company for William Life makes claim to two bonds. The bonds are not produced; Life is not produced and what is said in regard to Dr. Jillson applies to Life with the single exception that the record shows that Life was a stockholder in the American Finance Company and received his bonds by way of a dividend from the Finance Company.

(5.) Dr. Beach, two bonds.

Dr. Beach of the city of New York, it is said holds two bonds, but notwithstanding Dr. Beach is of the city of New York, Dr. Beach was not called upon to support his claim to the bonds or to produce them before the master. It would certainly be a new practice to award Dr. Beach or Wm. Life or Dr. Jillson a large sum of money in this contention upon account of bonds said to be held by them as bona fide purchasers without their having put in an appearance in this court before the master or testifying in support of their claims or producing to the court the bonds claimed. The title of bona fide purchaser is not so easily made out.

(6.) Mr. Wilson's bonds.

This same witness, Miner, says that a Mr. Wilson holds bond number 740 on a loan made without a note. Who Mr. Wilson is, where he lives, what knowledge he had when he acquired the bond, whether he has it yet or not, all are facts about which we are left in the dark. There are so many Mr. Wilsons it is rather difficult to make out who this particular Mr. Wilson is.

(7.) Mr. Clark's two bonds.

Mr. Miner invests Clark of Bridgeport with two bonds as collateral, Nos. 713 and 716. So far as Mr. Clark is

concerned he puts in no appearance here; no one appears before the master producing the bonds, and if any money is expected out of the sale in this case, it is to be turned over to him upon the verbal statement of Miner. We need not trouble ourselves long with such a claim as that.

(8.) Robert Black, one bond.

The foregoing observations apply to his bond. It is unnecessary to repeat them, and so as to the following, (9) and (10), George B. Barnes, one bond and H. Hamlin, one bond. (11) J. B. Mott, two bonds, to secure Miner's note stands in the same category.

(12.) Joel A. Sperry, ten bonds.

Sperry is the agent of the Finance Company in New Haven. He is not even called to testify. Miner testifies for him. (13) Eliza M. Church, two bonds, said to have been sold to her by the Finance Company; they are not produced; she is not produced; it is possible, however, that these are the two bonds that belonged to the Finance Company, that it received with the loan of ten thousand dollars; they seem to have been sold at par or about par.

This completes the list. All these bonds were received by the holders after the confirmation of the sale. Jillson may or may not have received his before. There is no evidence that any one of these persons is the holder at present of any of these bonds. They were all purchased of John C. Short; he holds a bond or two; Francis A. White was and is president of the Finance Company and president of the railway company; he certainly cannot be considered a bona fide holder.

One thing that is very suggestive in that respect is that if any of these persons have had the bonds long enough for any of the coupons to mature, they have been very quiet about not receiving their interest upon them, which is not very probable in regard to bona fide holders.

The bonds held by the Stewart estate, it is conceded, were received as a dividend from the Finance Company. The same thing is true of Life: they were all received with notice that the coupons were not paid. In other words they were received as dishonored bonds, which, as we shall have occasion to point out a little further on, is such notice as puts the purchaser upon inquiry and precludes his standing as a bona fide holder.—(See page 22, testimony.)

Mr. Short undertakes (beginning on page 22) to give an account of these bonds; and it is perfectly safe to say in regard to every person to whom the bonds were disposed of that none of them are in any sense bona fide holders: they stand upon the title of the Finance Company; and when pressed upon cross-examination Mr. Short (see page 33 of the testimony) says, speaking for himself and the Finance Company: "We are content with our title to the bonds, and we will make good anybody that holds any bonds as collateral or otherwise."

Mr. Short felt the need of making this declaration, and so he plants himself and those that he undertakes to represent here, whether with or without their consent we know not, upon the validity of his title. Of course if that title is good he is entitled to prevail to the extent at all events that the bonds are produced. If it is bad, he has no claim.

This is a proceeding for the distribution of the funds produced by the sale of the mortgaged premises. Certainly no person should be put on the list of distributees who does not produce his bonds in court, or show that they are lost and beyond his power to produce; but as we have seen, the bonds are not produced. The alleged owners are not produced, notwithstanding they are in the city and in convenient reach, and the whole case it put upon the cock and bull story of Miner and Short.

It is proper that we should observe in a general way in regard to points that are made about Brown's title to the bonds that Brown is the common source of title. It does not lie in the mouth of the Finance Company or of any other claimant or party to this contention to raise any question about his title. All claimants hold under him and if his title fails then no one can claim upon account of these bonds in contention any part of the proceeds of the sale.

It is unnecessary therefore to follow counsel in their lengthy observations in regard to Brown's title to these bonds. As between Brown and the Finance Company the Finance Company acquired whatever title it has through him.

It is a well settled rule that no one can be considered a bona fide holder of bonds or notes in such sense as to give him a better title than the party under whom he claims unless he has acquired the property in the ordinary course of business and for value and without notice of any infirmity or any dishonor of the paper.

We claim in regard to the bonds in question that they were the property of Brown: that they were put into the hands of the Finance Company with the other bonds in order that they might dispose of the bonds according to the contract or contracts between the parties and that when they had performed the labor they might have the means of paying for their services in their own hands.

We claim that the bonds were neither delivered to the Finance Company in payment for past or future services: that they were not delivered to them in payment in any sense: but that they were delivered to them in order that they might hold them until it was seen what the outcome should be, and when the contract on the part of the Finance Company should be fully performed that the Finance Com-

pany might then appropriate to its own use the bonds which up to fulfillment it merely held upon the contingency that it might become the owner by performing the conditions of the contract.

If we are right in this, then the Finance Company never having performed its contract, never became the owner of the bonds or any of them.

If we are wrong in this, then the Finance Company thus holding under it would probably be entitled to a distributive share of the proceeds of the sale.

It is well settled that no man can be a *bona fide* purchaser of commercial paper, in a commercial sense, so as to become vested with a better title than the preceding holder had, who has received the paper with notice of dishonor.

It is undisputed here that whoever received the bonds in question received them with past due coupons upon them and in the absence of evidence upon the subject we must assume that they received them from the Finance Company with knowledge of all the facts, knowledge of the title of the Finance Company and the contract under which it held the bonds.

Of course, if the purchaser or pledgee had such information then the pledgee would simply stand in the shoes of the Finance Company. If the title of the Finance Company would be good, then the pledgee's title would be good, and if bad, then pledgee's title would be bad.

The following cases will illustrate the rule:

In the case of Parsons vs. Jackson, 99 U. S. Rep., 440, the case beginning on page 434, Justice Bradley delivering the opinion of the court where bonds had been substantially stolen and they were claimed by certain persons who claimed to be *bona fide* holders, it appeared that when they were sold that several unpaid coupons were attached to the bonds, and speaking of these circumstances on page 440,

Judge Bradley said: "The presence of the past due and unpaid coupons was itself an evidence of dishonor sufficient to put the purchasers on inquiry."

See to the same effect Andrews vs. Bond and others, 13 Peters, 65, and 14 Peters, 318.

It may not be conclusive evidence of fraud or illegality that unpaid coupons remained on the bonds offered for sale, but it certainly is such a circumstance as to call upon the purchaser to make inquiry, and where, as in this case, it clearly appears that the purchaser has never presented any of the coupons for payment nor taken any steps to collect them, the inference is neither unreasonable nor unjust that he did make inquiry and did learn the true state of the case.

The evidence shows that these bonds were issued in January, 1884. Most of the *bona fide* purchasers claim to have acquired them in 1888 in November. There would be 9 coupons due. Now whilst the fact that one coupon was past due might not be strong evidence the case is very different where 9 coupons have matured, including the first and second and third, and so on to the end, and that none of them have been paid.

A man surely could not claim to be a *bona fide* purchaser of railway bonds that were wrongfully put in circulation where there were forty or fifty or sixty coupons and all of them due and unpaid when he made the purchase but one or two. Hence this case, like every other, must rest upon its own facts. The time when these bonds were disposed of, the litigation about them, the proceedings to foreclose the mortgage, the default in the payment of interest and the number of coupons that were past due and all the other circumstances attending the transaction, and when all are considered together with the great variety of claimants since the litigation was commenced, the conclusion is irresistible that the present purchasers stand upon no higher

footing than the original holder, The American Finance Company.

The rule is well settled in New York that where bonds or notes have been diverted from the use to which they were appropriated by the owner, that the burden of proof is upon the holder to show all the facts in connection with the acquisition of the bonds or notes.

See Farmers & Citizens National Bank vs. Noxon, 45 N. Y., 762; Edwards on Bills, 319-322; also 9th Wendall, 170, Wardwell vs. Howell.

Many other authorities might be cited, but these state the rule quite as well as a multitude.

III. As to the Hocking bonds.

We have the Hocking contract before us, and the evidence that the Hocking bonds were delivered as collateral security to that contract. It clearly appears that Hazzard, the president of the American Loan and Trust Co. is the real debtor to the loan and trust company for the money secured upon the pledge of these bonds. As the evidence shows Hazzard was the holder by purchase from the Hocking company of its contract with Brown. So far as the evidence goes he is still the holder.

One Crow, as the evidence shows, claims recently to have acquired from Hazzard his title to that contract. Hazzard being at the time the president of the American Loan and Trust Co., certainly had the amplest notice as to the terms upon which he held, and the Hocking road held, the twenty-seven bonds. Now what we claim in regard to those bonds is that they were delivered as security upon that contract. If the contract is brought in, or the person claiming it is brought in, and it appears that the damages under that contract are as much as the bonds, or as much as the dividend to be made from the proceeds of the sale of the bonds, then it doubtless would be proper to make such application.

but the trouble is that the bonds have been separated from the contract upon which the loan can be applied, and hence under the circumstances, whatever may be the ultimate rights of the parties, the American Loan and Trust Co. has no right to collect or receive any money upon account of its loan made to Ashley or to Hazzard upon the security of those bonds. It was a misuse of the security of which the Finance Company had the amplest notice. We claim, therefore, that no money whatever can be applied lawfully upon the Hocking bonds.

In regard to the number of bonds in contention, the amount first delivered to the Finance Company was eighty, three of the bonds under that contract of course subject to the terms as the other bonds were held, only confessedly one-half of one of those bonds belonged to Brown and now belongs to Burke and Hickox.

If the Finance Company had no other right to the three bonds than it had to the eighty, and confessedly it had not, then these three bonds stand on the same footing as the eighty.

There are two bonds, but which two we are unable to specify, that the Finance Company received with the ten thousand dollar note of Brown as a bonus, and which we suppose the company is entitled to hold, and that these are the only bonds which are entitled to come in and share in the distribution of the proceeds.

IV. The master reports the proof as satisfactory to him that the several claimants held and own bonds in question, but it is a curious fact which clearly appears in the testimony submitted that not one solitary bond was exhibited to the master, nor did any person claiming to hold or own any of the bonds in question appear before the master as a witness.

We have commented in detail upon the evidence bearing upon each of the bonds, and we say that there is no evidence in the master's report showing that one solitary person claiming to hold or own any of these bonds in good faith appeared before the master and gave testimony, and that not one of them produced the bonds for identification or otherwise.

If this testimony was satisfactory to the master, we can only say it ought not to have been satisfactory to him and ought not to be satisfactory to any other court.

In view of the confessed facts and evidence submitted it is obvious that the exceptions to the master's report should be sustained.

STEVENSON BURKE.

DOYLE, SCOTT & LEWIS,
of Counsel.

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FILED
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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

STEVENSON BURKE and CHARLES G. HICKOX,
Administrator of Charles Hickox, Deceased,
Appellants,

vs.

THE AMERICAN LOAN & TRUST COMPANY
et al.,
Appellees.

BRIEF FOR APPELLEE.

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of Counsel.

JOHN POLHEMUS PRINTING COMPANY, Printers and Mf'g Stationers, 121 Fulton St.

In the Supreme Court of the United States,

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STEVENSON BURKE *et al.*,
Appellants,

vs.

THE AMERICAN LOAN & TRUST COMPANY *et al.*,
Appellees.

Brief for Appellees.

Statement of the Case.

The statement of the case contained in Appellants' Brief is so incomplete that it is necessary to state the facts more fully.

This controversy relates to the ownership not of 83 but of 112 bonds of the Toledo, Columbus & Southern Railway Company.

They are a part of 825 bonds which, by the decree of foreclosure, were found and adjudged to be "outstanding as legal and valid obligations of the said defendant company" (Record, p. 109). There is no question, therefore, as to the right of the owners to share in the proceeds of the sale. The sole question is, who are the owners?

The appellants claim through assignment from one Theophilus P. Brown, unaccompanied by possession; the title of the appellees to 27 bonds comes from Brown through several intermediate transfers, all accompanied by possession, and to the remaining 85 bonds through transfers from the American Finance Co., also accompanied by possession.

In the year 1884 a corporation known as the Toledo and Indianapolis Railway Company was engaged in the construction of a railroad from Toledo southward towards Findlay. Theophilus P. Brown was president of the company and chief promoter of the enterprise. The company was in straits. It had issued, nominally to a concontractor named Dowling, its first mortgage bonds to the amount of $800,000. Though thus issued, those bonds had, in fact, been hypothecated for debts of the company contracted for rails and other supplies, and for money borrowed for construction. The road was not completed. Liens had been filed by various material-men and laborers. The mortgage made to secure the bonds was in process of foreclosure. The property was in the hands of a receiver (Record, p. 48). The enterprise was in serious danger. Brown was threatened with the loss of all he had put into it.

At this juncture he entered into negotiations with the American Finance Company, a New York corporation. A contract was made between them on the 14th of April, 1884, which is set out in full no less than four times in the record (pp. 48-53, 90-5, 140-6 and 166-72).

The scheme embodied in that contract did not work, and modifications were found necessary. On the 24th of September following, a new contract called the "Tripartite Agreement" was made between Brown, the Finance Co. and Messrs. Israel B. Mason and Francello G. Jillson, two citizens of Rhode Island.

That contract is also set forth in full four times in the record (pp. 53-6, 96-9, 146-9 and 172-5).

Under the last-mentioned agreement money was raised, debts paid, reorganization effected and the enterprise started on a new career under the name of the Toledo, Columbus & Southern Railway Company. Eight hundred bonds of the new company were issued in lieu of the like number of those of the old company (Record, p. 155), and 25 more were issued to Brown in payment for a small extension of the road at Findlay (Record, p. 157).

Of the 800 bonds issued in lieu of those of the old company, 715 were delivered to Mason and Jillson, 650 of them

as collateral for the loan of $325,000, specified in the "Tripartite Agreement," and 65 as a "bonus," as specified in article 9 of said agreement (p. 55); 80 of them were delivered to the Finance Co. as provided in the same article; and 5 of them were delivered to Brown.

On the 10th of December, 1885, Brown entered into a contract with the Columbus, Hocking Valley & Toledo Railway Company (pp. 181–3), which contract was probably drawn by Judge Burke (p. 197, at bottom), and was certainly executed by him as vice-president of the Hocking Valley Company (p. 183).

The purpose of that contract is apparent upon its face. It was concocted in "the interest of the parties" thereto, and was designed "to make such arrangements as to place "the property in the hands and control of the Columbus, "Hocking Valley & Toledo Railway Company," *a rival corporation* (p. 182, near top). The negotiations which led to it were kept a profound secret from Mason and Jillson and the Finance Co. (pp. 292–5).

It is needless to characterize such a transaction. But it may be observed, in passing, that while this contract recites that "said Toledo, Columbus & Southern Railroad Company is now represented in bonds *to the amount of eight hundred and twenty-five thousand dollars*, and a like amount of stock," it also recites that "said Brown is the owner of about four hundred and thirty thousand dollars, par value, of said stock, and of about *six hundred and fifty thousand dollars* of the bonds of said Company," thus admitting, by implication, that more than $150,000 of said bonds were owned not by him but by somebody else.

The plan by which the conspiracy thus begun was to be carried out was soon disclosed. In February, 1886, suit was brought in Brown's name, in the Supreme Court of the State of New York, against the Finance Co., Mason, Jillson and others, to annul, for usury, the notes given by Brown for the $325,000 raised by Mason and Jillson, and to recover from them and from the Finance Co. all the bonds which they had severally received under article 9 of the "Tripartite Agreement."

A large part of the record of that suit, all of which

was put in evidence before the Master, has been omitted from the record certified to this Court; but there is enough of it here for our purpose. It appears from Judge Burke's own evidence (for he was sworn as a witness, at his own instance), that he "conferred with Brown about bringing" that suit (p. 217, fol. 379); that he "knew it was to be brought" (*id.*); that he "helped him procure a bond" for the temporary injunction (p. 218, fol. 380); and that he "retained Col. Harrison" as Brown's attorney and paid him for his services (p. 220, fol. 383).

The temporary injunction obtained in the New York Supreme Court appears (at pp. 45–8) as a part of Brown's answer in the foreclosure suit, and Judge Wallace's order denying the motion for a permanent injunction (for the case had been removed to the U. S. Circuit Court) made on May 12, 1887, appears at page 267.

While that suit was pending three important events happened.

1st. On the 14th of April, 1886, a bill was filed in the Circuit Court of the United States for the Northern District of Ohio, by the American Loan & Trust Company, the trustee of the mortgage, by which these bonds were secured, against the Toledo, Columbus & Southern Railway Company and Theophilus P. Brown, praying, among other things, for relief against the conspiracy into which Brown had entered with the Columbus, Hocking Valley & Toledo Railway Company, and for the foreclosure of the mortgage.

2d. On December 15th, 1886, Brown, notwithstanding his agreement with the Columbus, Hocking Valley & Toledo Railway Company, made a year before, and which had never been cancelled, made a written contract with Stevenson Burke and Charles Hickox, whereby he undertook to sell to them all the stock and bonds of the Toledo, Columbus & Southern Railway Company, including "all "the stock and bonds of said railway company in the "hands of said Mason and Jillson, the American Finance "Company or any other person" (pp. 210–11). Said agreement provided that "the pending litigation with the Ameri-"can Finance Company" should be carried on by Burke and Hickox "in their own way and in the name of Brown "or otherwise" (p. 211).

3d. On the following day (December 16th, 1886) an agreement was made between Mason, Jillson, Burke, Hickox and Brown, by which Mason and Jillson agreed to sell and deliver to Burke and Hickox, and the latter agreed to buy, all of Brown's notes which then remained in their (Mason's and Jillson's) hands, amounting to $315,000; and all their interest in the bonds of the Toledo, Columbus & Southern Railway Co. then in their hands (amounting to $695,000) and by which Brown assented to such sale. That agreement was subsequently performed according to its terms.

From the time it was made, the Brown suit was prosecuted only against the American Finance Co., the controversy thenceforward relating chiefly to the title of that company to the 80 bonds which it had received under article 9 of the "Tripartite Agreement." The question whether the conditions of the contract of April 14th and September 24th, 1884, had been so far performed by the Finance Company as to entitle it to the compensation stipulated therein, was directly passed upon by Judge Wallace, whose decision sustained the right of the Finance Company to the bonds in question. See Master's Report, Record, p. 188, fol. 336.

Soon after Judge Wallace's decision was rendered, Burke and Hickox voluntarily dismissed that suit and paid $1,135.97 costs to the Finance Company (pp. 268–9).

Meanwhile the suit brought in Ohio had assumed a new phase. Brown had interposed an answer in that case and had successfully opposed an application for the appointment of a receiver; but as soon as Burke and Hickox had succeeded to his rights and those of Mason and Jillson, they wished the foreclosure to proceed, and, at their instance, the Trust Company, on the 3d of February, 1887, filed a Supplemental Bill alleging default on the part of the mortgagor in the payment of interest, and praying for foreclosure and sale (pp. 76–8).

But before that had been done, and on January 26th, 1886, the American Finance Company had filed an intervening petition, setting up, among other things, its title to 80 of the bonds secured by the mortgage in suit (p. 118, fol. 209).

On April 9th, 1887, while the Brown suit in New York was still pending, Burke and Hickox also filed an intervening petition, in which they alleged that they "were the "owners of a large majority of the bonds . . . . secured "by the mortgage mentioned in plaintiff's bill, to wit, over "$700,000 thereof" (p. 80), but they did not answer the intervening petition of the Finance Company, nor question its title to the 80 bonds claimed by it.

One Jeremiah C. King had also filed an intervening petition in which he set up certain alleged liens which he claimed were prior to the mortgage.

Such was the state of the pleadings, so far as related to the ownership of the bonds, when, on the 23d day of June, 1887, the decree of foreclosure and sale was entered (p. 108), all questions as to the validity of certain bonds (not a part of the 825 the validity of which was established by said decree) and as to the existence and priority of liens being continued.

On the 18th of October, 1887, Burke and Hickox filed an answer to the intervening petition of King (p. 115) in which they alleged that:

> "These defendants now have and own *the entire is-*
> "*sue* of the bonds of said railway company to the
> "amount of $825,000 with the interest accruing thereon,
> "except that the defendant, the American Finance
> "Company, who has intervened herein, claims to be
> "the owner of 80 of said bonds of $1,000 each, which
> "claim is disputed by the defendants and is in issue
> "in this action, but otherwise the ownership and title
> "of these defendants to all of said bonds is undis-
> "puted (p. 117).

And further on, the same answer contains the following:

> "And these defendants, herein and now answering
> "likewise the petition of the American Finance Com-
> "pany, filed herein on the 26th day of January, 1887,
> "denies that said American Finance Company, is a
> "*cestui que trust* of the complainant, or is the holder,
> "for value or otherwise, of any bonds of the Toledo,
> "Columbus & Southern Railway Company involved in

"this suit; that said American Finance Company now "claims to be the owner of 80 of said bonds, all the "others mentioned in said intervening petition of said "Finance Company having been taken up and can- "celled under the direction of the Court" (Record, p. "118).

Thus covertly and secretly did Burke and Hickox seek to raise an issue with the Finance Co. But a time came when it suited their purpose to revive more openly the controversy upon which they had been defeated before Judge Wallace.

The day was approaching for the sale of the mortgaged property, which had been advertised for October 16th, 1888. The development of oil and natural gas at Findlay had made that property very valuable, and they wanted to buy it. By the terms of the decree of sale, the purchaser must pay "at least one hundred thousand dollars ($100,000) of the "purchase money . . . . . in cash in hand to be "returned into the Court for distribution" (p. 113, fol. 200). Messrs. Burke and Hickox did not want to pay $100,000 in cash, or any part of it, into Court until obliged to. By making it appear that they were the holders of a large majority of the bonds and *claimed all the rest*, they hoped to get the decree so far modified as to enable them to buy and get control of the property without the actual payment of any money at all. They would then be in a position to renew the contest with the Finance Company, and the longer they could continue it, the greater their own profit and the better their chance of tiring out their antagonist.

Accordingly, on the 15th day of October, 1889, *the day before that on which the sale was to take place*, upon a petition verified by Judge Burke two days before, and not filed until the day on which the order was signed, *and without any notice whatever, real or constructive, to the complainant or to any other bondholder*, they procured an order modifying the original decree so as to permit them to give a bond in lieu of any money payment (p. 125).

In the petition upon which that order was obtained

(which, as filed, is styled "Motion to Modify Decree") appears the first claim put forth openly by Burke and Hickox to any of the bonds now in dispute (p. 123).

Although this petition had sufficed for the purpose of getting the decree modified as desired, the petitioners did not think it sufficient to rest their case upon, and therefore, on the 24th of the same month, they filed a second intervening petition directly assailing the title of the Finance Company to the eighty bonds claimed by it (pp. 129-30).

In due time the Finance Company filed its answer to said second petition, alleging, among other things, that *before the filing of said second petition* it had sold, pledged, assigned, transferred and set over to various persons and corporations, for value, all of said eighty bonds, and that said transferees and assignees, and not the Finance Company, were the lawful owners and holders of said bonds (pp. 159-166).

Thus the record stood, when, in February, 1889, an order was entered confirming the sale and directing the execution and delivery of a deed to Messrs. Burke and Hickox, upon their surrendering to the Master the 713 bonds held by them. They had previously executed a bond in lieu of a cash payment, pursuant to the order of October 15th, 1888.

Having thus gotten the property into their possession and enjoyment without the payment of one cent of money to which the other bondholders were entitled, although there were outstanding thirty-two bonds the validity of which had been established by the decree of the Court, and the title to which had not, up to that time, been questioned, they secured the entry, in the order of confirmation, of the following provision:

> "And it being made further to appear to the Court "that there are certain bonds secured by the mortgage "foreclosed in this action, the ownership and title to "which are in dispute herein, it is ordered that the "Special Master, A. J. Ricks, to whom all the matters "in issue have been heretofore referred, shall proceed "without delay to the testimony upon the issues thus "presented, and to report the same to this Court at as "early a day as practicable, as to the ownership of such

"bonds and all other matters relating to the distribu-
"tion of the purchase money in issue in this cause
" and referred to him as aforesaid" (p. 134.).

When the matter came to a hearing before the Master, Judge Burke conducted the proceedings, and was himself sworn as a witness. Upon cross-examination he stated distinctly that he made no claim to the twenty-seven bonds held by the Trust Company as collateral to Ashley's notes, and which were then spoken of as "Hazard's bonds," and told all about the changes of possession which those bonds had gone through (pp. 207–9).

But in his argument below he claimed, as he claims in his brief here (at pp. 30–1), that the Trust Company had no valid title to those bonds and ought not to be allowed to share, in respect to them, in the proceeds of the foreclosure, and his exceptions cover the findings of the Master in respect to those bonds as well as to those relating to the remaining disputed bonds.

While only eighty bonds had been mentioned as in controversy in any of the intervening petitions or the answers thereto, the testimony before the Master disclosed the fact that there were actually eighty-four (besides the "Hazard bonds") which were held by parties other than Burke and Hickox. It appeared that two of those had been received by the Finance Company as a "bonus," in connection with one of Brown's notes, and Judge Burke concedes that the title of the Finance Company to those bonds is good, but he is unable to identify them (see Appellant's Brief, p. 31).

The other two bonds, it was shown, had been claimed and received by the Finance Company as its commission on the twenty-five bonds issued to Brown in connection with the extension of the railroad to the tracks of the I. B. & W. Railway Co. at Findlay (p. 288, fol. 486).

Argument.

I. The rule that the burden rests upon the appellant, applies in this case with three-fold force, because

1. The controversy relates to negotiable instruments: the decision below was in favor of the holders; and "actual possession of a negotiable instrument payable to bearer, or indorsed in blank, is plenary evidence of title in the holder until other evidence is produced to control it."

Collins v. *Gilbert*, 94 U. S., 753.

2. The presumption is in favor of the correctness of a judicial decision, and grows stronger with each affirmance.

3. That presumption is immensely fortified in this case by the fact that, as to eighty of the bonds in dispute, precisely the same questions were litigated between Brown (appellants' assignor) and the Finance Company, before Judge Wallace, in the Second Circuit, and were decided in the same way.

Brown v. *American Finance Company*, 31 Fed. Rep., 516.

II. As to the 27 "Hazard bonds"—the bonds numbered 694, 695 and 801 to 825, inclusive,—there is neither allegation nor proof in appellants' favor.

Nowhere, in any of the intervening petitions, motions and other papers filed in their behalf, was the title of the American Loan & Trust Company to those bonds questioned, nor were they claimed by the appellants; and Burke himself swore that he and Hickox had no claim upon them (p. 207). Those bonds were a part of the 825 adjudged by the decree of June 23d, 1887 (Record, pp. 108-14) to be "outstanding as legal and valid obligations of said defendant company," and that decree has never been appealed from or otherwise questioned.

III.—The American Finance Company had good title to the 80 disputed bonds.

1. That it had lawful possession, has never been disputed. On the contrary, in their second intervening petition appellants expressly state that "the said American Finance Company came into possession of said eighty bonds *under and by virtue* of two certain articles of agreement," etc. (p. 129). But it is contended that such possession was qualified or conditional, and that the Finance Company never complied with the conditions.

2. There is no dispute as to the terms of the agreements referred to. Both are in writing. It is agreed that they must be construed together.

3. Appellants' contention is, that the American Finance Company undertook to perform two separate and distinct services, namely, first: to secure a loan of a definite sum of money, for which it was to receive a commission of two and one-half per cent; and second, to sell 800 bonds, for which its compensation was to be ten per cent.; that it performed the first service and received the stipulated pay therefor; but that it never sold any of the bonds, and, hence, never earned any portion of the ten per cent. The delivery of eighty bonds is sought to be accounted for upon the theory that the Finance Company received them in trust for Brown, or as his agent or bailee.

4. But we say, *first*, that the Finance Company's undertaking was something entirely different; that it involved the performance of important services in no way involved in, or necessarily connected with, either the procuring of a loan or the selling of bonds, and provided for contingencies in which the Finance Company would become entitled to both commissions, though not a bond should have been sold: *second*, by the terms of the "tripartite agreement," as understood by the parties, the transaction therein provided for was treated as a sale of the bonds so far as to entitle the Finance Company to the eighty bonds thereby "appropriated" to it; *third*, that those bonds were delivered

neither in trust for Brown nor to his agent or bailee, but to the Finance Company, acting in its own behalf, and *in payment* for services rendered and to be rendered; and, *fourth*, that even if it should be held that it was payment in advance for services thereafter to be rendered in the sale of the residue of the 800 bonds, yet, as Brown, before the time for performance of that service had expired, wrongfully interfered and prevented further effort to sell the bonds, the title of the Finance Company became absolute and could not thereafter be defeated by Brown or his assigns.

First. The first inquiry, then, must be, What did the Finance Company undertake to do for Brown?

Appellants' contention seeks to narrow the discussion to the mere construction of the language of the agreements of April 14th and September 24th, 1884. But we say that it is impossible to understand those instruments without reference to the circumstances under which they were made. It will be necessary to "look not only to the language employed, but to the subject matter and the surrounding circumstances," and to avail ourselves "of the same light which the parties possessed when the contract was made."

Merriam v. *United States*, 107 U. S., 437.

Appellants' argument assumes that when the parties met, Brown was in a position to borrow a large sum of money, that is to say, that he was prepared to furnish that without which large loans are not secured, namely, *some sort of acceptable collateral*, and that there were 800 bonds *within reach*, and ready to be delivered whenever purchasers could be found.

Nothing could be further from the truth. For although the contract of April 14th recites that Brown was "the owner of all the stock except a nominal amount and all of the first mortgage bonds ($800,000) of the Toledo and Indianapolis Railway Company," it also recites that "said bonds are now held in hypothecation, by various persons and corporations, to secure the payment of certain obligations of said railway

company" and of Brown himself; that said railroad "is now in the hands of and is being operated by a receiver;" and that "there are sundry lien claims outstanding against said railway company and claims for rights of way, labor and materials not secured by collateral" (p. 48).

In point of fact, Brown's interest in the Toledo & Indianapolis Railway Company was purely speculative—the interest of a "promoter" who devises a scheme to make money through the use of other people's capital. He may have been, and doubtless was, the originator of the enterprise, and had probably devoted a good deal of time to it. *But his scheme had not been successful.* It broke down before the bonds were marketed. Not one of them had been sold, and the road had been built, so far as built at all, on credit.

But a railroad forty miles long had been built, and had value. The people whose money or labor had gone into it, were numerous and scattered, and many of them were poor. They were all anxious to get what they could, and many of them were willing to take what they could get out of what seemed to be a wrecked enterprise.

Brown was shrewd enough to see that if he could raise sufficient money he could purchase the secured claims at a discount, and, by the freezing out process of a foreclosure sale, could compel the unsecured creditors to take what he might see fit to give them, and that he might thus realize large profits.

His fertile mind had also conceived the idea of extending the railroad "to some point in the Hocking Valley," other people, of course, furnishing the money.

This was the precise situation; such were the circumstances under which the contract of April 14th was made, and in the light of which it must be construed.

Two things were to be accomplished for which Brown needed assistance. The first was to secure control of the 800 outstanding bonds of the Toledo & Indianapolis Railway Company; the second, to give new life to the enterprise—or, in the language of Short's letter of September 16, 1884 (p. 276, fol. 469), to "set the road on its feet"—so that those bonds might be exchanged for others *which would be marketable.*

For the fact must not be lost sight of that even if the entire issue of old bonds had been in Brown's possession, they would not have been available in any money market in the world, either as collateral to secure a loan, or as marketable securities, *so long as the road was in the hands of a receiver and its mortgage in process of foreclosure.*

Moreover, Brown's plans involved an extension of the railroad. What he wanted is stated in the preamble to the agreement of April 14th, which declares that he had "ap- "plied to the party of the second part for its services, assistance and facilities in obtaining means with which to "discharge said existing claims and obligations and *to ex-* "*tend said line of railway* as above mentioned" (p. 48).

The precise method of procedure by which the ends thus aimed at were to be attained is not so clear. Certainly, no well matured plans are disclosed by the first agreement. Many provisions of that instrument are singularly vague and indefinite, not to say contradictory. It opens with an undertaking *on the part of Brown* "to sell and transfer the said stock and bonds and all the property and franchises of the said Toledo & Indianapolis Railway Company to a new company, to be organized by the said party of the second part" (p. 48); and the first promise of the Finance Company is "to proceed without unnecessary delay, upon the execution of this agreement, to organize the said new railroad company . . . . . and to the procuring of the engraving of the bonds and stock for the same" (p. 49).

One would suppose, in view of the circumstances, that the first thing provided for would have been the payment of the debts of the old company, so as to get control of, and *to be able to transfer*, "all its stock and bonds" to a new company.

It is true that by the second article the Finance Company also agrees to procure "the settlement of the outstanding claims secured by the pledge of the bonds aforesaid," and to secure "the loan of, say $300,000 or $400,000 in money, as may be deemed practicable to be made upon pledge of said outstanding bonds of said Toledo & Indianapolis Railway Company, or upon the bonds to a like amount of the proposed new railroad company," etc. (*ib.*).

But the procuring of a loan *upon the pledge of bonds* would appear to be somewhat difficult of accomplishment unless the borrowers *had the bonds in their possession so as to be able to pledge them.* By what means the parties expected the "settlement of the outstanding claims" was to be accomplished *in advance of the procuring of the loan* does not appear. Indeed, they did not expect it, for, further on, Article II provides that "the proceeds arising from such loans" are to be used in taking up such claims as are liens prior to the mortgage and to the settlement of all other claims, etc. This, however, makes nothing clear, and, if it did, the confusion would return with the last sentence of the article, which declares that "such loans *when made* are to be secured by the promissory note of said party of the first part, *with said bonds*" (which bonds, those of the old company or those of the new?) "at not more than fifty cents to the dollar *as collateral security.*" Of course, as already suggested, no bonds could be pledged "*as collateral security,*" so long as they remained in the possession of creditors of the old company. And so the scheme, as embodied in the agreement of April 14, *revolved in a circle, and had neither beginning nor end.*

Indeed, it cannot be said that even the procuring of a loan for a large sum was regarded by the parties as a *sine qua non*, for Article VIII (p. 51) shows that they contemplated the possibility of releasing more than one-half of the bonds of the old company by settling the indebtedness for which they were pledged by the use of "bonds and stock of said new railroad company at not less than the rates herein fixed," *i. e.*, ninety cents on the dollar (Art. VII, p. 50). Article IX (p. 51) also recognizes the anticipated possibility that bonds of the new company might be "exchanged for outstanding liabilities."

Undoubtedly, both Brown and the Finance Company realized that *some* money would have to be borrowed, but as to the amount, and the means by which the loan was to be effected, they gave themselves all the latitude possible. They even thought that Brown might be able to secure a loan without the assistance of the Finance Company, and

provided that if he should do so "on the present bonds of the Toledo and Indianapolis Railway Company," the Finance Company should receive no commission thereon (Art. XV., p. 53).

Nor is it any more clear that the Finance Company was bound to sell any portion of the 800 bonds of the new railroad company which were to be issued in exchange for a like number of the old bonds. *That the old bonds were not to be sold in any event is plain.* In the first place, they were not marketable securities, as already shown. Secondly, there is not a word in the agreement providing for their sale except *permissive* language in Article VII. (p. 50), evidently inserted for the benefit of the Finance Company and not to impose upon it an obligation. Thirdly, a sale of those bonds would have been inconsistent with, and probably fatal to, the scheme for organizing a new company whose stock and bonds were to be issued, dollar for dollar, for those of the old company. The sale of the old bonds would have rendered it impossible for Brown to perform the stipulations of the agreement on his part.

Did the Finance Company undertake to sell any of the *new* bonds *for Brown's benefit?* and was its right to commissions to be dependent upon the performance of that service?

The possibility of the sale by the Finance Co. of *all* the bonds of the new railroad company was certainly contemplated. For, though Article III provides for the issue of stock and bonds of the new company "to be used in the purchase of stock, bonds and property of said Toledo & Indianapolis Railway Company," yet, Article IV says "the stock of said new railroad company to the amount of $25,000 per mile and its first-mortgage bonds to the amount of $20,000 per mile, *or the net proceeds of said bonds*, are to be paid for the stock, bonds and property of said Toledo & Indianapolis Railway Company" (p. 49); and, by Article V, "said party of the second part also agrees to *undertake the negotiation of the entire issue* of the bonds, etc., of said new railroad company" (p. 50).

The language last quoted is the sole foundation afforded by the original agreement for the claim of appellants

that the Finance Company was bound to *sell* Brown's bonds.

Now, we submit that the words "negotiate" and "negotiation," as used in this agreement, were not intended or understood to mean "sell" or "sale," *and nothing else.*

To sell, according to Webster, is "to transfer property or the exclusive right of possession to another, for an equivalent *in money.*"

But by the terms of Article V the "negotiation" undertaken by the Finance Company was to be "for money, *means and credit.*" And Article VIII expressly confers upon the Finance Company the "right to negotiate a settlement" with the parties "holding $401,000 of said bonds" (of the old company), "as collateral for a given sum of money," and "to use therefor bonds and stock of said new railroad company at not less than" ninety cents on the dollar (p. 51). If the rolling-mill company at Chicago had seen fit to accept payment of its claim in bonds of the new company, at ninety cents on the dollar, could it have been successfully claimed that the Finance Co. had not earned its ten per cent. commission on the bonds thus used, because it had not *sold* those bonds?

But the parties evidently did not mean to leave room for any such question, for, by Article IX, they provided that the Finance Company should receive its ten per cent. "from time to time, *pro rata*, as any of such bonds shall be negotiated, sold or *exchanged for outstanding liabilities* or for property, labor and materials required by said railroad companies or either of them, or *otherwise used or disposed of*" (p. 51); and, in Article X, they agreed that the Finance Company should have "forty-five per centum of the capital stock of said new railroad company, the same to be issued and delivered," "*pro rata*, from time to time, as said bonds or any of them shall be negotiated or *otherwise disposed of*" (*ib.*).

And, finally, as if to settle the point beyond the possibility of question, the last Article (Art. XV), declares "that *it is the intention of this agreement* that if the proper amount of securities of said new railroad company shall *in any manner be utilized or used, in acquiring said Toledo*

& Indianapolis Company's securities or property, said party of the second part is to be paid its commissions as hereinbefore fixed (p. 53).

We submit, then, in all confidence, that, even under the original agreement, the Finance Co. was not bound to sell a single bond, in order to earn its commission of ten per cent.

Second.—But the agreement of September 24th must also be considered; as well as *what took place between the making of the two.*

The interval was a period of more than five months. During that period the parties discovered that serious difficulties lay in their way. Although Brown's notes, aggregating $325,000, had been made and delivered to the Finance Company in June *the necessary collateral did not accompany them*, and no loan had been secured. It came to be seen that *some way must be found to induce capitalists to part with their money in advance of the delivery of the collateral*, so that the money might be used to release that collateral from the existing liens upon it. Such a way was found by the Finance Company. A perfectly feasible plan was devised and men were produced who were willing to carry it out. *It necessarily involved the intervention of a trustee between the lenders and the borrower;* a trustee *acceptable to the lenders;* and a trustee *charged with active duties involving large responsibilities and much labor.*

The plan thus developed was embodied in the "tripartite agreement." It is quite safe to say that without that plan, or something substantially like it, the end Brown had in view could never have been accomplished. That it imposed upon the Finance Company important duties and grave responsibilities not even remotely involved either in the procuring of a loan or in effecting the sale of bonds, is obvious.

It is to be observed that the "tripartite agreement" is much narrower in its scope than the agreement of April 14th. It contains no provision whatever for the sale or negotiation of any bonds either to provide for the payment of the loan obtained from Mason and Jillson, or for the extension of the road to Columbus, although it does expressly

provide for an extension to a junction with the I. B. & W. Road at Findlay. It gives to the new parties—Mason and Jillson—power to prevent the organization of a new company in their discretion (Art. 7, p. 55). And, after providing for the use of $650,000 of the existing bonds of the old company, it "*appropriates*" "all of the remainder," as follows: "1. To the purchasers of said notes their said "bonus, amounting to $65,000 thereof, to be distributed "among them *pro rata*, according to their respective hold- "ings of said notes. 2. To said American Finance Com- "pany, $80,000 thereof, in full payment of all its claims "for commission for negotiating said $800,000 of said bonds. "3. To said Brown, $5,000 thereof; such appropriations "and the delivery of said bonds to be made from time to "time *pro rata*, as said notes are disposed of."

Thus we see that the eighty bonds in dispute were delivered to the Finance Co. not "in trust for Brown," nor as his agent or bailee, but in "payment" for something. What was it that was thus paid for? The contract says it was "full payment of all its *claims for commissions* for negotiating said $800,000 of said bonds." And appellants contend that the word "negotiating" here means *selling* and nothing else. We have already seen that so narrow a construction cannot be put upon this word as used in the original agreement.

As already said, the "tripartite agreement" is narrower in its scope than the agreement of April 14th. It was not designed to supplant or replace that agreement, but rather *to provide a way for its partial performance*. The two contracts must, therefore, be construed together. By the terms of the earlier one it was expressly provided that if a new railroad company should be organized, and "if the proper amount" of its securities should "in any manner beutilized or used in acquiring said Toledo & Indianapolis Company's securities or property," the Finance Company should be "paid its commission as hereinbefore fixed" (p. 53.). *This provision was undoubtedly inserted in view of the services which the Finance Company was to render and the expenses it was to incur in connection with the organization of the new railroad company and the transfer of*

the property to that Company and the giving of new life to the enterprise. The "tripartite agreement" not only left the Finance Company with all that work to do and that expense to incur, but imposed upon it the additional burden of a very important and onerous trust, involving labor which extended through several months. Both labors were fully and successfully performed. Not only was a loan of $325,000 secured, and the old debts and liabilities all cleared up, but the new company was organized, the pending foreclosure was carried to judgment, the railroad property was sold, bought in and transferred to the new company; and bonds and stock of that company were issued, dollar for dollar, for those of the old company, everything in that direction being done in exact accordance with the terms of the first agreement (p. 155), so that "the proper amount of securities of said new railroad company" *were* "used in acquiring said Toledo and Indianapolis Company's securities or property." And yet the appellants ask that the Finance Company shall now be adjudged to have earned only the paltry commission of 2½ per cent. on the sum borrowed. And they tell you that "it stands confessed that no commissions have been earned;" and that "it stands confessed that the sole consideration upon which the Finance Company was to own the 80 bonds was in payment for commissions, which commissions have not been earned!" (Brief, p. 19.)

By whom has any such confession been made? What warrant have counsel for such assertions? They are as disingenuous and unfair as is the attempt (which immediately follows in the brief) to convey the impression, by an implication, that the lenders of the $325,000 had done the work which "set the road on its feet," and had been paid to their satisfaction therefor.

But, to return, the fact is not to be lost sight of that the only bonds which are mentioned in article 9 of the "tripartite agreement"—the bonds of the old company—*were not to be sold at all.* Their sale at "not less than" ninety cents on the dollar would have been impossible *without the resuscitation of the old company, the dismissal of the foreclosure suit, and the abandonment of the scheme for the organization of a new company.*

Nothing is more certain than that the abandonment of that scheme was not seriously contemplated. Article 10 of the "tripartite agreement" (p. 55), shows that the parties still intended that "the proposed new railroad company" should be organized, and should "issue its bonds and stock for the purchase of the bonds and stock of said Toledo & Indianapolis Railway Co. to a like amount now outstanding" (fol. 96), just as was subsequently done.

But, as we have already seen, the parties had, by Article XV. of the original agreement, expressly declared it to be their intention that "if the proper amount of the securities of said new railroad company" should "*in any manner* be utilized or used in acquiring said Toledo & Indianapolis Company's *securities* or property," the Finance Co. should be paid its commission, as therein fixed. On what ground of reason or justice, then, can it be held that the Finance Co. was bound to sell 800 bonds, or any bonds, of either the new or the old company in order to earn the 80 bonds "appropriated" to it by the "tripartite agreement"? If those bonds were not to be deemed earned until the rest of the 800 had been sold, why was not the delivery of them to the Finance Co. deferred until a sale had been made? By the terms of Article 9 they were to be delivered "from time to time *pro rata as said notes are disposed of.*"

Short's letter to Brown, of September 24th, 1884 (p. 275), has a very important bearing upon this question. Judge Wallace thought it conclusive. When it was written the parties were in perfect accord, and they remained so more than a year thereafter. Short kept no copy of it. Clearly, then, it was not written for the purpose of *making evidence*.

That letter enclosed the draft of the "tripartite agreement." Short, very justly regarding the two and one-half per cent. commission allowed by the original agreement for procuring a loan, as inadequate compensation for the services his company was rendering for Brown, and *in order that there might be no misunderstanding as to the additional ten per cent.*, said:

"Our company cannot afford, of course, for the lit-

"the 2½ per cent. commission on the loan only, to use "its position and capital to *set the road on its feet* "and take the risk of your death and any contin- "gency that might otherwise arise, and hence *we and* "*Messrs. Jillson and Mason are treating the negotia-* "*tion as a sale of the bonds;* but in doing this our "company extinguishes all its claims for commission, "so far as the present portion of the road is con- "cerned" (p. 276, fol. 479).

Appellants' counsel say this letter is inadmissible (Brief, p. 9). But Brown himself produced it and *his counsel put it in evidence.* On what ground, then, is it to "be ruled out?"

Again, they say, "it is expressly denied by Brown that he assented to its terms." We answer, *no such denial can be found in the record.* Then the learned counsel try to destroy its effect by saying: "It is evidently a skillful and bright attempt upon the part of Short to circumvent and overreach his principal" (*ib.*).

Such stuff is nonsense. Brown was an experienced business man. He received that letter and the proposed "tripartite agreement," which it enclosed, at least a week before the latter was signed. He acknowledged the receipt of the letter on September 17th, and promised to "look over the proposition at once" (p. 277). He had abundance of time to do so. He was fully apprised that the Finance Company and Mason and Jillson would understand that agreement to mean that the use of the bonds of the Toledo & Indianapolis Railway Company in the manner provided for therein was to be equivalent to a sale of the bonds, so far as to entitle the Finance Company to its ten per cent. commission.

There is not a pretense of proof that he dissented in any way.

> "It is a rule of law, as well as of ethics, that where the language of a promissor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to believe it was *understood* by the promissee."
>
> *Hoffman* v. *Aetna Ins. Co.*, 32 N. Y., 413.

White v. *Hoyt*, 73 N. Y., 505, 511.
Paul v. *Travellers' Ins. Co.*, 112 *id.*, 479.
Dennis v. *M. B. Association*, 120 *id.*, 503.
Potter v. *Berthelet*, 20 Fed. Rep., 240.

Third. But, we are told, if resort is to be had to Short's letter, then that letter shows that the eighty bonds in dispute were delivered to the Finance Company not in *payment* for anything, but *in trust*, and we are asked, as if it were an unanswerable question:

> "If it was the understanding of the parties that the bonds were to be turned over absolutely to the Finance Company as its own property, what need for the bonds, or any of them, to go into the hands of a trustee?" (Brief, p. 11).

This supposed poser is based upon a fragment of a sentence taken from the letter. The whole sentence is as follows:

> "They" (meaning Mason and Jillson) "want all the bonds, so far as possible, to be deposited in one place, and have therefore proposed that all the bonds outside of the $650,000 which go with the notes, shall be left with a trustee to be agreed upon, until it is known what the outcome is to be. These bonds can be withdrawn, of course, at any time that you and we and they agree" (Record, p. 276).

This sentence is immediately followed by the passage upon which we rely, and then comes the following:

"And so our company also puts *its $80,000 bonds* in trust along with *yours* and *theirs*, and *we will not be entitled to any coins, on the bonds of the new company issued to take up the old*" (p. 276, fol. 469). Our antagonists contend that the "trust," thus referred to, related solely to the eighty bonds "appropriated" to the Finance Company, and that the uncertainty implied in the words "until it is known what the outcome is to be," related to the expected sale of the 800 bonds.

But so far is the language of the letter from sustaining such a view, that it really emphasizes the fact that the 80

bonds appropriated by Article 9 of the "tripartite agreement" to the Finance Company were to be *its property*. Short says "*our Company* also puts *its $80,000 bonds* in trust with *yours* and *theirs*," by "yours" meaning the five bonds which were to go to Brown, and by "theirs" the sixty-five "bonus" bonds appropriated to Mason and Jillson. Moreover, it is plain that the bonds to be in trust were not merely the 80 now in dispute, but "all the bonds outside the $650,000 which go with the notes," that is to say, the remaining 150 bonds. Observe that it was at the suggestion *not of Brown*, but of *Mason and Jillson*, that this trust was to be created. What was its purpose and what the contingency referred to in the words "until it is known what the outcome is to be?"

When Short's letter was written it was not expected that the then existing bonds—the bonds which were to be "left with a trustee"—would be sold at all. All of the parties anticipated—what subsequently happened—that the pending foreclosure suit would be carried to judgment, the property sold and bought in, a new company organized and new bonds issued. In the same letter Short had said:

> "The notes were intended to run one year from July 1, '84. Mr. Mason thinks you ought to have more time to make sure of not having to need an extension, although he believes that under our plan, as disclosed in our agreement with you, the *new company* can organize, get out its bonds and *market them* before July 1, '85," etc. (p. 275).

But it was not yet *certain* that a new organization would be substituted for the old, as clearly appears from section 7 of the "tripartite agreement":

> "7. Upon the purchase, assignment and delivery of the claims secured by the pledge of first-mortgage bonds, such action shall be taken in relation to the receivership, taking judgment on such claims, or the entering of a decree of foreclosure, *or the dismissal of the suit of the Union Trust Company of New York, Trustee, now pending*, as the parties hereto may deem best; it being understood that upon the request of the

holders of said notes, said Brown, acting as president of said Toledo and Indianapolis Railway Company, is to forward or retard all legal proceedings now pending, or such as may be hereafter commenced, *as the holders of said notes may deem advisable*." '

It is therefore clear that the contingency referred to in the words "until it is known what the outcome is to be" was the very one covered by Section 7, and no other. If the foreclosure suit should be pushed to judgment and sale, it would become necessary to use the old bonds in paying for the property; and it was a matter of simple prudence, in the interest of all parties, *that those bonds should be kept within reach for that purpose*, until it was either consummated or abandoned. Mason and Jillson could sell none of the 650 bonds pledged to them. It was but natural that they should demand that the other parties be prevented from selling theirs until it should be "known what the outcome was to be," that is to say, *whether those bonds were to continue in existence and be put into circulation, or to be replaced by like bonds of a new company.*

Now, such being the nature and purpose of the trust, the end in view was fully accomplished when judgment of foreclosure had been entered, the property sold and bought in, and the old bonds used in payment and thereafter destroyed, and that trust then came to an end. Not one of the bonds of the new company was to be, or ever was, held in trust by or for anybody.

It follows, then, that the eighty bonds were appropriated and delivered to the Finance Company precisely as Article 9 says they were to be, "*in full payment* of all its claims for negotiating said $800,000 of said bonds;" and we say that under Article XV of the original agreement said commissions were fully earned as soon as "the proper amount of securities of said new railroad company" had been "used in acquiring said Toledo & Indianapolis Company's securities," as they were used when they were exchanged for the old bonds and stock.

Fourth.—But there is another view which is equally fatal to appellants' contention. They have not ventured

to refer to it in their brief, though it was called to their attention in the argument below. Their silence is a *cognovit*.

It is admitted of record that the Finance Company received the eighty bonds "under and by virtue" of the two agreements of April 14th, and September 24th (p. 129).

Article 9 of the latter agreement is conclusive that they were received "*in full payment* of all its claims for commissions." "Commissions" are earned by the performance of services.

The sole question is *whether the services thus paid for had already been rendered, or were thereafter to be rendered.* If the latter, then it was a case of *payment in advance*, but *payment nevertheless.*

Now conceding, for the sake of the argument, that the services thus paid for were to be performed thereafter, what must be shown to entitle Brown or his assigns to recover the price paid? Obviously, *a breach of the contract on the part of the Finance Company.*

There is neither allegation nor proof of any such breach. On the contrary, the evidence is conclusive that Brown himself committed a most flagrant breach by entering into a conspiracy with the officers of the Hocking Valley Railroad Company to betray both the Finance Company and Mason and Jillson; to turn over all the property of the Toledo, Columbus and Southern Railway Company to the Hocking Valley Company, *a rival corporation*; to repudiate both the agreement of April 14th, and the "tripartite agreement"; to bring an action to have the latter declared void for usury; and *actually to* PREVENT *the sale of any bonds by the Finance Company.* The proof of such conspiracy is found in the agreement made between Brown and the Hocking Valley Company, through Stevenson Burke as its vice-president, in December, 1885 (pp. 181-3), and in Burke's and Brown's admissions on cross-examination (pp. 217-18, 291-2). That agreement was confessedly entered into without any notice whatever either to the Finance Company or to Mason and Jillson (p. 294 at top), none of whom were apprised that Brown claimed that they had failed to perform the contracts on their part, or were given any opportunity to perform them after notice. The conspiracy thus

begun was followed by the commencement of a suit in New York, on the 13th of February, 1886 (p. 217), and the procuring of a temporary injunction which expressly restrained and enjoined the Finance Company from "selling or otherwise disposing of, assigning or transferring the 800 bonds," which it is now said the Finance Company were bound to sell in order to earn their commission (p. 47).

It would require considerable hardihood to say that the Finance Company committed any breach of the contract in failing to sell bonds *after the service of that injunction*. If there was any breach, therefore, which entitled Brown to demand a return of the 80 bonds *paid* to the Finance Company, it must have occurred before February 13th, 1886.

Now, what breach of either contract had been committed by the Finance Company prior to that date? Let the appellants specify. The burden is upon them. But they are silent. They have omitted from the record the papers upon which the injunction referred to was issued, although they were contained in "Exhibit B 1" mentioned at the top of page 267, and extracts from which are printed at page 275 and following.

But they have given us a notice (p. 158) appended to an affidavit made by Judge Doyle (pp. 152-8). That notice is dated March 10th, 1886, *fifteen days after the issuing of the injunction*. By it Brown revokes the contracts of April 14th and September 24th, and elects to declare them void.

That notice was prepared by Judge Doyle (p. 155) who was Brown's lawyer. It must be presumed to state as strong a case as he could make. The only specific reason assigned for revoking the contracts, is that the time for performance has expired. Vague charges of violation, and of failure and of refusal of performance, are made, but nothing definite is suggested.

Upon cross-examination of Brown we sought to learn from him what grievences he really had (pp. 295-8).

The first thing he could recall was that the Finance Company had not saved enough money out of the $325,000 borrowed from Mason and Jillson to pay the interest on

his notes. But he admitted that there was no agreement which reserved any money for that purpose (fol. 496), and that it took considerable more money to settle up the old debts than he had anticipated (p. 296). After further prodding he was able to recall that the Finance Company had caused stock of the new company to be issued to it as trustee which he claimed should have been issued in his name, and that he did not find that out until they sent him a proxy to vote on that stock, *which he proceeded to do* because he "wanted the same thing carried that they did" (pp. 296–7). The pretense that he then became satisfied that the Finance Company and Mason and Jillson were conspiring to rob him was an after-thought.

The issuing to the Finance Company, as trustee, of all of the stock except one share for each director, was just what Article 5 of the "tripartite agreement" required (p. 55). By the terms of that article not a share of that stock was to be issued to Brown until the payment of the loan, or default of payment. In the meantime, if issued at all, it must be issued in the name of the trustee, as was done.

Had there been any breach of the contract in the failure of the Finance Company to sell Brown's bonds prior to the commencement of his suit?

Certainly not, unless the time within which they were to be sold had expired. But that is not pretended. The only limitation of the time for selling bonds contained in the agreement of April 14th, appears in Article XIV. But that limitation applies only *to the bonds designed to provide means for the extension of the road beyond Findlay.*

The language is as follows:

> "When said loan is obtained of sufficient amount to pay off said claims, or said railway shall be purchased at said judicial sale, as hereinbefore provided, it is agreed that unless said party of the second part shall raise the money, means or credit *necessary for the extension of said railroad to Columbus, Ohio*, or other point to be agreed upon by the parties hereto, within one year from the date of procuring the said loan, *or from the date of the purchase of said road*, then

and in that case this contract for negotiating *the securities of or for said extension may*, at the option of said party of the first part, become null and void."

That Brown clearly understood that this limitation applied only to bonds to be sold to extend the road, appears from his answer in the foreclosure suit, in which he alleged:

> "That it was provided also in said contract that the said American Finance Company should negotiate certain bonds to be provided *for the extension of said railroad company*, provided they did so within one year from the date of said contract, and if they did not do so within that time, then Brown was to have the right to terminate *that part of the agreement providing for such extension;* that the American Finance Company wholly failed to make any negotiation for said bonds providing *for said extension*, or to provide any money therefor within the time named; and said Brown, in writing, notified them of the termination of the contract *in that respect*" (p. 41).

The notice here referred to is, of course, the one a copy of which is attached to Doyle's affidavit (p. 159). That notice is dated March 10, 1886. How can it be claimed, then, that the Finance Company was in default in respect to the sale of the bonds in February preceding? In point of fact, there was no express limitation whatever of the time within which the 800 bonds were to be sold. We say none was inserted, because it was understood by the parties that those bonds might not be sold at all.

But, to continue the concession that to earn its commission the Finance Company was to sell those bonds, we say no express limitation was inserted, because the parties were content with that which the law would imply, namely, *a reasonable time*.

2 Parsons on Contracts, 47.

What constitutes a reasonable time must be determined upon a consideration of the circumstances of each particular case.

> "The true rule must be, that that is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer."
>
> 2 Parsons on Contracts, 174.

Now, the fundamental purpose of the agreement of April 14th, so far as it concerned Brown, was accomplished when a loan was obtained sufficient to settle the liens and claims, and to secure the possession and control of the road already built and its extension to a connection with the I. B. & W. Road at Findlay. The securing of a loan sufficient for that purpose rendered a speedy sale of his bonds unnecessary. A sale in time to provide means to pay the loan at maturity, would meet all the requirements of the situation. And *it was precisely for the purpose of giving abundance of time to make such sale that the loan was made to run two years.* In his letter of September 16th, 1884, Short wrote to Brown:

> "The notes were intended to run one year from July 1, 1884. Mr. Mason thinks you ought to have more time, *to make sure of not having to need an extension*, although he believes that, under our plan, as disclosed in our agreement with you, the new company can organize, get out its bonds and market them before July 1, 1885, *unless something now unforeseen shall prevent;* but for the amount he will take himself he practically proposes to enlist for the war, and thinks his associates will probably feel the same way. *Hence his suggestion of more time*" (p. 275).

Accordingly the notes were made to run two years, and they did not become due until September 24th, 1886. A sale of the bonds made so as to realize the proceeds at any time before the last named date would, therefore, fully meet the requirements of the case. Is there any reason to suppose that it was the understanding of the parties that they must be sold *before February 13th, 1886*, and that, if they were not, the Finance Company would, at Brown's option, forfeit its right to sell them and be bound to return to Brown the 80 bonds delivered to it in payment?

No fact has been disclosed—no testimony has been given—tending to show any such understanding. On the contrary, the reasonable inference from Mason's suggestion, communicated to Brown in Short's letter, is that the parties, although they believed that the new company could "organize, get out its bonds and market them before July 1, 1885," nevertheless realized that there were contingencies which might prevent that consummation, and intentionally provided against such contingencies by extending the period of payment to two years.

There is no reason to suppose that if the agreement of December 10th between Brown and the Hocking Valley Company had not been made Brown would have thought of claiming that the Finance Company was in default. Nor is there anything to warrant the conclusion that if he had not interfered a sale would not have been made before September 24th, 1886, and in time to provide means to pay his notes.

We submit, then, that no breach of contract had been committed by the Finance Company when Brown forbade, and instituted a suit to prevent, further efforts to sell his bonds. He, and not the Finance Company, broke the contracts and rendered a sale impossible; and by no law, human or divine, can he or his assigns recover the price paid for services the performance of which his own wrongdoing prevented.

IV. There were other bonds (only two of which were produced before the Master) in respect to which Brown testified upon his direct examination (which is wholly omitted from the record) that Short, president of the Finance Company, claimed that 2½ bonds were due them for commissions under the contract, and retained them. Being asked, upon cross-examination, for the whole conversation he said (p. 288):

> "Well, he said that came under the extension and that they had a right, under the contract, to 10 per cent. of the bonds for any extension. I objected to his construing the contract that way; told him there was nothing in the contract could give him any right to any commissions; and this was not the extension re-

ferred to in the contract, as this extension was done with my money, and not any money he had raised from the bonds, or that there was any sale of the bonds; he said that was his construction of the contract and he should retain a commission of 10 per cent., and retained three bonds. * * * * He said he would retain three bonds—he could not very well split one up—and give me a receipt for half a bond; when they should be sold I would be entitled to a half a bond from them; *so I accepted that, getting what I could from them;* I had hard work to get my money out of them."

Now, not to consume time about a small matter, we submit:

1st. That Brown, having acquiesced in the claim of the Finance Company to 2½ bonds, and having taken its receipt for ½ of a bond, the proceeds of which were to be accounted for to him when the three bonds were sold, is estopped to deny, as against all third persons dealing with the Finance Company in good faith and for value, the right of that company to dispose of these bonds; and

2d. That, as the three bonds in question have not been identified or in any way distinguished from any others of the eighty-five bonds title to which is derived through the Finance Company, it is not possible for the Court to make any award in respect thereto as against the present holders of any of said eighty-five bonds.

V.—We come now to the question whether the present holders are within the law merchant.

1. Appellants say: "It may be safely stated that there is no precedent for such a multitude of *bona fide* holders of outstanding bonds as we have presented here upon the record."

It would not seem courteous to the very learned and eminent counsel to characterize such an utterance as it deserves. It is not argument, and to call it sophistry would be to malign the sophists. Whoever heard, before, that the extent to which the bonds of a railroad company

are distributed has anything to do with the *bona fides* of a single holder! Must a man who is asked to buy, or loan upon, two or five or ten bonds inquire how many other men have done the same thing? It is absurd.

2. In view of the fact that none of the present holders (except the three who were stockholders of the Finance Company) received their bonds until after the rendition of Judge Wallace's decision, which practically established the validity of the Finance Company's title, how much propriety is there in accusing that Company of "indecent haste and persistent efforts to rid itself of the actual possession of the bonds in question?" And what possible bearing has the accusation upon the question of the good faith of the present holders?

3. The learned counsel are seriously mistaken respecting the loans made by the American Loan & Trust Company upon which it held a portion of the disputed bonds as collateral security. There is no evidence to warrant the statement that that company "holds certain bonds as security for several loans made to the president of the company, Mr. Hazard, or to J. M. Ashley, or both," and the assertion is a wholly gratuitous fling both at the Trust Company and at Mr. Hazard. The evidence shows that the Trust Company held fifty-two bonds as collateral to four notes, two of which notes for $10,000 each were made by J. M. Ashley; another for $14,000, by the Finance Company, and the fourth for $2,000, by J. C. Short. There is not a word of evidence to connect Hazard with any of those notes. And the title to the bonds held as collateral to the Ashley notes, twenty-seven in number, was not derived from or through the Finance Company in any way. Judge Burke, as a witness, distinctly stated that the title to those bonds was not questioned (p. 207). But Judge Burke, as counsel, now takes different ground.

The bonds held as security for the other two notes are part of those in dispute.

The learned counsel thinks it is enough to say, in respect to them, that "the record of the contention in New "York * * * * * shows that the American Loan &

"Trust Company was a party to the litigation and there-
"fore had the amplest notice in regard to the claim of
"Brown and of those who here claim the bonds under
"him;" to which we answer, that, four months before the loan was made to the Finance Company, and nearly a year before the loan to Short, it had been decided by Judge Wallace in the "contention in New York," that "the "claim of Brown and of those who here claim the bonds "under him" had no foundation in law or in fact; and that the title of the Finance Company to those bonds was valid; a decision which, to use the language of Judge Wallace, "*disposed of the controversy, so far as it related to the eighty bonds.*"

"Brown and those who here claim the bonds under him" *acquiesced in that decision,* voluntarily discontinued their suit, and paid costs.

The Trust Company, therefore, acting with knowledge of those facts, and in reliance on that decision, loaned its money in good faith, taking these bonds as security. We submit that not only is it a *bona fide* holder for value, and entitled to protection as such, but that it is *mala fides* of the grossest kind for the appellants to dispute its title.

4. All that is said in criticism of the proof offered in support of the title of Messrs. Cannon, J. A. Jillson, Dr. Beach, Wilson, Clark, Black, Barnes, Hawkins, Motr, Sperry and of Eliza M. Church, proceeds upon the theory that the burden of proof is upon the holder rather than upon him who questions the holder's title.

As to that we need only refer to the case of *Collins* v. *Gilbert* (94 U. S., 753), already cited.

Not a word of proof was offered on the part of the claimants to impeach the title of the holders. It is simply claimed that the proof offered by the latter is insufficient. But why insufficient? Because the circumstances under which they acquired the bonds and the consideration given are not shown in each case? By no means. Merely this, that they did not appear in person as witnesses in their own behalf, nor produce their bonds before the Master. Well, there is no law that requires the holder to prove his

title by his own testimony; and if the actual production of the bonds before the Master were necessary, Messrs. Burke & Hickox would not have established their title to a single bond. Judge Burke was permitted to prove his title without producing any bonds. When the Master asked if exception was taken to the non-production of the bonds, Mr. Fowler, with his customary courtesy, replied: "No; Judge "Burke says they have theirs, and * * * his state- "ment is sufficient" (p. 229.)

Judge Burke accepted and availed himself of that courtesy; and when it came to the taking of proofs in New York, Mr. Fowler, in the cases of people who were absent from that city and whose bonds, therefore, could not be conveniently produced, pursued the same course which he had allowed to his antagonist, and followed the precedent established by that gentleman and without objection. The statement, however, that "the American Loan & Trust "Company even had not brought the bonds within the "jurisdiction of the Court, nor in any way submitted them "to the Master," can only be accounted for upon the supposition that the learned counsel have not read the testimony; the truth being, as the record shows (page 232 that the assistant secretary of the Trust Company appeared before the Master and *actually produced* the fifty-two bonds held by that Company, and read their numbers, which were taken down by the official stenographer in the presence of the Master. The record also shows that the bonds held by Mr. Cannon were produced and their numbers taken in the same way (page 244). If the learned counsel had read the record more carefully they would not have said "It is a curious fact, which clearly appears in the testimony submitted, that not one solitary bond was exhibited to the Master" (Brief, p. 31).

5. It is further urged that the present holders have no better title than the Finance Company, because they were put upon inquiry as to the title by the fact, shown by the past-due coupons attached to the bonds, that they had been dishonored. And, in support of this proposition, we are referred to *Parsons* v. *Jackson* (99 U. S., 440), and *Andrews* v. *Pond* (13 Peters, 65, and 14 Peters, 318).

The last case involved no question as to the effect of the presence of past-due coupons, and is not in point. *Parsons* v. *Jackson* was limited in *Railway Company* v. *Sprague* (103 U. S., 756), where it was held, following *Cromwell* v. *Sac Company* (96 U. S., 51), that the mere presence upon the bonds, when purchased, of unpaid coupons does not make the bonds dishonored paper.

The true rule by which to determine what circumstances are sufficient to put a purchaser or pledgee of negotiable paper upon inquiry is stated in 1 Daniel on Negotiable Instruments, sec. 796, as follows:

> "The more correct opinion, as it seems to us, is that the circumstances must be so pointed and emphatic as to amount to proof of a *mala fides* in the abstinence of inquiry, or such as to be *prima facie* inconsistent with any other view than that there is something wrong in the title, and thus amount to constructive notice. In other words, we would say that if the circumstances are of such a character as to create such a distinct legal presumption and *prima facie* proof of fraud, or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee. This rule fixes a criterion for judgment which is definite and seems to us the one which should be adopted. *The proof of the existence of the circumstances amounting to implied notice must be clear.* As said by Waterbury, *J.*: 'It *must clearly appear* that the endorsee was apprised of such circumstances as would have avoided the note in the hands of the endorser.' "

Not only, therefore, is the burden of proof upon him who assails the title of the holder of negotiable paper, but he must make a *clear case* against the *bona fides* of the holder.

No such case has been made—no case at all has been made—against any of the holders of the disputed bonds here except the two or three who were connected with the Finance Company.

6. There is absolutely nothing in this case to raise any question about the diversion of any of these bonds from the purpose to which they were appropriated. The cases on that subject cited in the brief are therefore wholly irrelevant.

VI.—The decree appealed from should be in all things affirmed, with costs.

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of Counsel.